

# POSTPARTUM PSYCHOSIS: A LEGITIMATE DEFENSE FOR NEGATING CRIMINAL RESPONSIBILITY?

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## I. INTRODUCTION

*"O your heart must have been made of rock or steel,  
You who can kill  
With your own hand the fruit of your own womb."<sup>1</sup>*

Euripides, from the play *Medea*

She shared 350 square feet of living space with a husband and four children, living in a converted Greyhound bus bought from a traveling minister.<sup>2</sup> As a valedictorian and college graduate, she once worked as a registered nurse.<sup>3</sup> Yet after the birth of her first child, her sole responsibilities were at home, primarily taking care of her children and serving as their home-school teacher after her husband



Figure 1: Andrea Pia Yates\*

\* CNN.com, *Officer Says Yates Led Him to Her Dead Children*, at <http://www.cnn.com/2002/LAW/02/18/Yates.trial/index.html> (last modified Mar. 11, 2002). Photograph provided with permission from CNN.com.

1. 3 THE COMPLETE GREEK TRAGEDIES: EURIPIDES 102 (David Grene & Richmond Lattimore eds., 1959).

2. See Margery Eagan, *Yates Shatters Maternal Myth of Competence*, BOSTON HERALD, Sept. 11, 2001, at News4, available at 2001 WL 3810809; Lee Hancock, *Documents Reveal Yates' History of Mental Illness*, SEATTLE TIMES, Sept. 3, 2001, at A2, available at 2001 WL 3519756; Lee Hancock, *Yates Long Had Visions of Violence*, DALLAS MORNING NEWS, Sept. 2, 2001, at 1A, available at 2001 WL 26643421; Laura Parker, *'Psychotic,' but Is Andrea Yates Legally Insane?*, USA TODAY, Sept. 11, 2001, at A1, available at 2001 WL 5471183; Jim Yardley, *Medical Records Tell a Story of Mother's Deep Depression*, ORLANDO SENTINEL, Sept. 9, 2001, at A4, available at 2001 WL 9207781.

3. See Lee Hancock, *Yates Believes 'Devil' Is in Her*, DALLAS MORNING NEWS, June 30, 2001, at 1A, available at 2001 WL 24407027; Parker, *supra* note 2; Susan Schindehette et al., *Nightmare*, PEOPLE, July 9, 2001, at 50, 53, available at 2001 WL 7420382; *60 Minutes: Why Did She Do It?* (CBS television broadcast, Dec. 9, 2001) (transcript on file with author); *Today: Interview with Dirk Johnson* (NBC television broadcast, June 25, 2001) (transcript on file with author), available at 2001 WL 23800822.

decided that babysitters should not be hired for fear of outside influences.<sup>4</sup>

Despite all of the exhaustion, frustration, and pressures, she still managed to be a loving mother by all accounts—walking to the park or bookstore with her children in tow, playing basketball, and making heart-shaped coupon books cashable for hugs and games on Valentine's Day.<sup>5</sup> In addition to her maternal responsibilities, she also took care of her father who was suffering from Alzheimer's disease—changing his clothes, feeding him, and bathing him on a daily basis.<sup>6</sup>

However, she began to slide slowly into depression.<sup>7</sup> She had a long family history of mental illness—in fact, practically every one in her family has been diagnosed with some form of depression.<sup>8</sup> After the birth of her fourth child, she tried to kill herself by overdosing on her father's Alzheimer medication.<sup>9</sup> On another occasion, she tried to slit her throat with a steak knife.<sup>10</sup> The failure of both suicide attempts led to repeated hospitalizations, in which doctors diagnosed her with severe postpartum psychosis.<sup>11</sup>

4. See Eagan, *supra* note 2; Hancock, *supra* note 3; Parker, *supra* note 2; Schindehette et al., *supra* note 3, at 54; Today, *supra* note 3; see also Amanda Ripley, *A Mother No More*, TIME, July 2, 2001, at 30, 30 (noting Andrea Yates struggled to home-school her children), available at 2001 WL 22574530.

5. See Pam Easton, *Woman Tells Police of Methodically Killing Children*, ASSOCIATED PRESS NEWSWIREs, June 22, 2001; Mike Glenn et al., *Mom of 5: "I Killed My Kids"*, HOUSTON CHRON., June 21, 2001, at 1, available at 2001 WL 23609237; Ripley, *supra* note 4, at 30; Today, *supra* note 3.

6. See Eagan, *supra* note 2; Hancock, *Yates Long Had Visions of Violence*, *supra* note 2; Yardley, *supra* note 2; 60 Minutes, *supra* note 3; Today, *supra* note 3 (mentioning Andrea Yates was responsible for her father's daily care for the last seven or eight years of his life).

7. See Hancock, *Documents Reveal Yates' History of Mental Illness*, *supra* note 2; Hancock, *supra* note 3; Schindehette et al., *supra* note 3, at 52; Yardley, *supra* note 2; 60 Minutes, *supra* note 3.

8. See Hancock, *supra* note 3; Hancock, *Yates Long Had Visions of Violence*, *supra* note 2; Yardley, *supra* note 2.

9. See Eagan, *supra* note 2; Hancock, *Documents Reveal Yates' History of Mental Illness*, *supra* note 2; Hancock, *supra* note 3; Hancock, *Yates Long Had Visions of Violence*, *supra* note 2; Parker, *supra* note 2; Ripley, *supra* note 4, at 30; Schindehette et al., *supra* note 3, at 52-54; Lisa Teachey, *Release of Yates' Records a Legal Maneuver*, HOUSTON CHRON., Sept. 2, 2001, at NEWS 37, available at 2001 WL 23625714; Yardley, *supra* note 2; 60 Minutes, *supra* note 3; Today, *supra* note 3.

10. See Eagan, *supra* note 2; Hancock, *Documents Reveal Yates' History of Mental Illness*, *supra* note 2; Hancock, *supra* note 3; Hancock, *Yates Long Had Visions of Violence*, *supra* note 2; Parker, *supra* note 2; Ripley, *supra* note 4, at 30; Teachey, *supra* note 9; Yardley, *supra* note 2; Today, *supra* note 3.

11. See Hancock, *Documents Reveal Yates' History of Mental Illness*, *supra* note 2; Hancock, *Yates Long Had Visions of Violence*, *supra* note 2; Parker, *supra* note 2; Teachey, *supra* note 9; Yardley, *supra* note 2; Today, *supra* note 3.

Yates told her therapist about the voices she had been hearing, which instructed her to get a knife and stab people around her; these voices resulted in bloody, violent delusions.<sup>12</sup> She explained that she tried to kill herself because it would be better to end her own life than to endanger the lives of others.<sup>13</sup> Noting that her husband's determination to have a big family was putting a severe strain on her,<sup>14</sup> the doctors advised her that having more children "will surely guarantee further psychotic depression."<sup>15</sup>

Nevertheless, she conceived and welcomed the birth of a fifth child.<sup>16</sup> Four months after the birth, her father died,<sup>17</sup> and she was suddenly plunged into another bout of depression.<sup>18</sup> She required further hospitalization because she was completely mute and only sleeping one or two hours a night.<sup>19</sup> She became non-responsive to anti-depressants and stopped eating, leading to the point when she could no longer breast-feed her newborn.<sup>20</sup> She was so severely depressed, paranoid, and psychotic that the doctor initially sought to have her involuntarily committed but discharged her a few weeks later.<sup>21</sup>

12. See Eagan, *supra* note 2; Hancock, *Documents Reveal Yates' History of Mental Illness*, *supra* note 2; Hancock, *Yates Long Had Visions of Violence*, *supra* note 2; Parker, *supra* note 2; Teachey, *supra* note 9; Yardley, *supra* note 2; *60 Minutes*, *supra* note 3.

13. See Hancock, *Documents Reveal Yates' History of Mental Illness*, *supra* note 2; Hancock, *Yates Long Had Visions of Violence*, *supra* note 2; Parker, *supra* note 2; Teachey, *supra* note 9; Yardley, *supra* note 2.

14. See Eagan, *supra* note 2; Hancock, *supra* note 3; Parker, *supra* note 2; Yardley, *supra* note 2.

15. Hancock, *supra* note 3 (revealing Yates told psychiatrists about her fear of failure toward raising her kids); Teachey, *supra* note 9; *60 Minutes*, *supra* note 3.

16. See Hancock, *Documents Reveal Yates' History of Mental Illness*, *supra* note 2; Hancock, *Yates Long Had Visions of Violence*, *supra* note 2; Parker, *supra* note 2 (recounting how the Yates' told their doctors they wanted to have more children); Teachey, *supra* note 9 (mentioning the Yates' wanted to have as many children as "nature would allow").

17. See Eagan, *supra* note 2; Easton, *supra* note 5; Hancock, *Documents Reveal Yates' History of Mental Illness*, *supra* note 2; Hancock, *Yates Long Had Visions of Violence*, *supra* note 2; Parker, *supra* note 2; Schindehette et al., *supra* note 3, at 52; Teachey, *supra* note 9.

18. See Easton, *supra* note 5; Hancock, *Documents Reveal Yates' History of Mental Illness*, *supra* note 2; Hancock, *Yates Long Had Visions of Violence*, *supra* note 2; Ripley, *supra* note 4, at 30; Schindehette et al., *supra* note 3, at 52; Teachey, *supra* note 9; Yardley, *supra* note 2.

19. See Eagan, *supra* note 2; Easton, *supra* note 5; Hancock, *Documents Reveal Yates' History of Mental Illness*, *supra* note 2; Hancock, *Yates Long Had Visions of Violence*, *supra* note 2; Ripley, *supra* note 4, at 30; Teachey, *supra* note 9; Yardley, *supra* note 2.

20. See Hancock, *Documents Reveal Yates' History of Mental Illness*, *supra* note 2; Hancock, *supra* note 3; Hancock, *Yates Long Had Visions of Violence*, *supra* note 2; Yardley, *supra* note 2; *60 Minutes*, *supra* note 3.

21. See Eagan, *supra* note 2; Hancock, *Documents Reveal Yates' History of Mental Illness*, *supra* note 2; Hancock, *Yates Long Had Visions of Violence*, *supra* note 2; Parker,

She was hospitalized again when she was found kneeling beside a bathtub filled with water for reasons she would not, or could not, explain.<sup>22</sup> Four weeks later, her depression began to spiral into a deep psychosis.<sup>23</sup> Overwhelmed, sad, and anxious, she became catatonic and non-communicative, internalizing her fears and angers.<sup>24</sup>

For months, she had thought she was a "bad mother"—surely the Devil was inside her.<sup>25</sup> She had recurrent obsessive thoughts about her children and how they might turn out because of her failures.<sup>26</sup> She believed her children were "hopelessly damaged" because of her own incompetence—permanently scarred and disabled.<sup>27</sup>

On June 20, 2001, she watched her husband leave for work.<sup>28</sup> An hour later, she drowned her five children in the bathtub, one by one.<sup>29</sup> She laid the bodies of her youngest children on her bed after each drowning, covering their bodies with a sheet, and left her eldest child in the bathtub.<sup>30</sup> Panicked, she called the police and then her husband, asking him

*supra* note 2; Teachey, *supra* note 9; 60 Minutes, *supra* note 3. The doctor initially sought to obtain a forced medication order from the court, noting Yates faced continued deterioration and possibly death; however, the doctor, just a few days later, requested a suspension of the commitment hearings. See Hancock, *Yates Long Had Visions of Violence*, *supra* note 2.

22. See Eagan, *supra* note 2; Hancock, *Documents Reveal Yates' History of Mental Illness*, *supra* note 2; Hancock, *Yates Long Had Visions of Violence*, *supra* note 2; Parker, *supra* note 2; Schindehette et al., *supra* note 3, at 54 (noting that, despite Yates' repeated hospitalizations, Child Protective Services claimed that her case was never assigned to a case worker because the hospital failed to assess Yates as a danger to her children); Teachey, *supra* note 9.

23. See Easton, *supra* note 5; Hancock, *Documents Reveal Yates' History of Mental Illness*, *supra* note 2; Hancock, *Yates Long Had Visions of Violence*, *supra* note 2; Parker, *supra* note 2; Schindehette et al., *supra* note 3, at 55.

24. See Eagan, *supra* note 2; Hancock, *supra* note 3; Hancock, *Yates Long Had Visions of Violence*, *supra* note 2; Parker, *supra* note 2; Schindehette et al., *supra* note 3, at 55; Teachey, *supra* note 9; 60 Minutes, *supra* note 3.

25. See Hancock, *supra* note 3; Hancock, *Yates Long Had Visions of Violence*, *supra* note 2; Patricia J. Williams, *Beyond the Village Pale*, NATION, July 16, 2001, at 9, available at 2001 WL 2132753; Today, *supra* note 3.

26. See Hancock, *Yates Long Had Visions of Violence*, *supra* note 2; Ripley, *supra* note 4, at 30; Williams, *supra* note 25; Today, *supra* note 3.

27. See Eagan, *supra* note 2; Hancock, *supra* note 3; Ripley, *supra* note 4, at 30; 60 Minutes, *supra* note 3; Today, *supra* note 3.

28. See Glenn et al., *supra* note 5; Ripley, *supra* note 4, at 30; 60 Minutes, *supra* note 3.

29. See Glenn et al., *supra* note 5; Parker, *supra* note 2; Ripley, *supra* note 4, at 30; 60 Minutes, *supra* note 3.

30. See Easton, *supra* note 5; Glenn et al., *supra* note 5; Ripley, *supra* note 4, at 30; 60 Minutes, *supra* note 3.

to come home as she began to realize she had just killed her children.<sup>31</sup> Finally, she had done what the voices had long told her to do.<sup>32</sup> Such is the story of Andrea Yates.<sup>33</sup>

This tragic incident inevitably calls to mind figures like Susan Smith, the South Carolina mother who had so tearfully pled for the return of her sons from "kidnappers" on national television, but who had, in actuality, drowned her children by strapping them to their car seats and rolling her Mazda into a lake.<sup>34</sup> Similarly, more alarming headlines leap to mind: of teenage mothers abandoning their babies in dumpsters, like Melissa Drexler, a high school mother who gave birth during her prom in a toilet and left the baby in a garbage can so she could return to her date.<sup>35</sup> Stories such as these make us question the existence of maternal instincts and the unconditional nurturing that society has so often associated with the mother-child relationship.

Public reaction in the wake of these cases has plunged the nation into a vortex of controversy, dividing the sexes along gender lines.<sup>36</sup> Panic has already driven four Houston mothers, fearing that they may face a similar fate to that of Andrea Yates, to ask Child Protective Services to take away their infants.<sup>37</sup> Conversely, recent controversy surrounding the Yates case may also cause new mothers to hesitate before asking for help, lest they be accused of harboring homicidal thoughts toward their chil-

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31. See Easton, *supra* note 5; Glenn et al., *supra* note 5; Ripley, *supra* note 4, at 30; 60 Minutes, *supra* note 3.

32. See Eagan, *supra* note 2; Easton, *supra* note 5; Ripley, *supra* note 4, at 30; 60 Minutes, *supra* note 3.

33. See Eagan, *supra* note 2; Easton, *supra* note 5; Glenn et al., *supra* note 5; Hancock, *Documents Reveal Yates' History of Mental Illness*, *supra* note 2; Hancock, *supra* note 3; Hancock, *Yates Long Had Visions of Violence*, *supra* note 2; Parker, *supra* note 2; Ripley, *supra* note 4, at 30; Schindehette et al., *supra* note 3, at 50-55; Teachey, *supra* note 9; Yardley, *supra* note 2; 60 Minutes, *supra* note 3; Today, *supra* note 3.

34. See Louise Branson, *If You're a Woman and This Doesn't Melt Your Heart . . . You're Not Alone*, SCOTSMAN, Jan. 6, 2000, at 14, available at 2000 WL 7536036; Susan Caba, *She Loves Me, She Loves Me Not*, AGE, Feb. 5, 2000, available at 2000 WL 2313540; Williams, *supra* note 25.

35. See Rekha Basu, Commentary, *Time to Tell These Moms Their Babies Can Be Saved*, S. FLA. SUN-SENTINEL, Aug. 19, 2001, at 1B, available at 2001 WL 22750537; Branson, *supra* note 34; Caba, *supra* note 34.

36. See Parker, *supra* note 2.

37. See Jan Jarboe Russel, *Post-Partum Depression Doesn't Explain Andrea Yates*, SAN ANTONIO EXPRESS-NEWS, July 1, 2001, at 1G, available at 2001 WL 22459249; Sally Satel, *The Newest Feminist Icon*, WALL STREET J., Sept. 11, 2001, at A26, available at 2001 WL 2875243. In the aftermath of the Yates news story, the Houston Child Protective Services received four telephone calls in a single day from mothers suffering from postpartum depression who feared that they may follow Yates' example. See Russel, *supra*.

dren.<sup>38</sup> A large number of women, especially those who are mothers themselves, sympathize with the plight of Andrea Yates,<sup>39</sup> yet many men see postpartum psychosis as a contemptible excuse.<sup>40</sup> Men tend to feel this controversial defense is primarily used to escape criminal liability,<sup>41</sup> similar to theories of pubescent hormones<sup>42</sup> and the testosterone<sup>43</sup> defense. Contrasting the media treatment of Andrea Yates with other accused killers like Nikolay Soltys,<sup>44</sup> a Ukrainian immigrant charged with

38. See Bob Herbert, *We Have Two Standards of Justice for Killers*, SEATTLE POST-INTELLIGENCER, July 8, 2001, at D8, available at 2001 WL 3562566; Nancy A. Ruhling, *Not for Profit: Women Get Help for the Baby Blues*, NEWSDAY, June 26, 2000, available at 2000 WL 10021440; Satel, *supra* note 37; Sherry Thomas, *Furor About Yates Rages On*, HOUSTON CHRON., Oct. 7, 2001, at LIFESTYLE1, available at 2001 WL 23634200.

39. See Herbert, *supra* note 38; Kathleen Parker, *Men, Women Disagree About Mom Charged in Killing 5 Kids*, ORLANDO SENTINEL, Aug. 19, 2001, at G3, available at 2001 WL 9203871; Mark Steyn, *Moms Defend a Baby-Killer*, SPECTATOR, June 30, 2001, at 18, available at 2001 WL 10480111; Thomas, *supra* note 38.

40. See Anne Koenig, *PPD: From the Man's Perspective: Husbands Talk About the Toll of Postpartum Depression*, SUNDAY NEWS (Lancaster, Pa.), Aug. 12, 2001, at G1, available at 2001 WL 9302243; Parker, *supra* note 39; D.L. Stewart, *Yates' Crime Proof of Illness*, DAYTON DAILY NEWS, July 3, 2001, at 1C, available at 2001 WL 21267074; Steyn, *supra* note 39.

41. See Koenig, *supra* note 40; Parker, *supra* note 39; Stewart, *supra* note 40; Steyn, *supra* note 39.

42. See Phyllis T. Bookspan et al., *On Mirrors and Gavels: A Chronicle of How Menopause Was Used as a Legal Defense Against Women*, 32 IND. L. REV. 1267, 1271 (1999) (defining the menopause defense as a form of sexism and ageism because it characterizes a middle-aged woman as inevitably becoming mentally or physically ill); Koenig, *supra* note 40; Stewart, *supra* note 40; Thomas, *supra* note 38.

43. See *People v. Moore*, 498 N.E.2d 701, 706 (Ill. App. Ct. 1986) (noting the testosterone defense, which is only used in rape cases, is similar to an insanity defense because it is based on uncontrollable urges caused by hormone imbalances); Koenig, *supra* note 40; Parker, *supra* note 39; Thomas, *supra* note 38.

44. Nikolay Soltys, a 28-year-old former shoemaker and Ukrainian immigrant, was charged with a total of seven murders, including his: pregnant wife (adding the murder of his unborn child), uncle, aunt, two cousins (both aged nine), and his 3-year-old son. See Eric Bailey, *Accused Mass Killer Found Dead in Cell Jail*, L.A. TIMES, Feb. 14, 2002, at B1, available at 2002 WL 2453954; Alexa Haussler, *Authorities Say Sacramento Killer May Be Psychotic*, ASSOCIATED PRESS, Aug. 23, 2001; Parker, *supra* note 39; *Suspect in Murder Spree Kills Himself—Immigrant Was Being Held in Deaths of Wife, Son and 4 Others in Family*, STAR-LEDGER (Newark, N.J.), Feb. 14, 2002, at 045, available at 2002 WL 1340704 [hereinafter *Suspect in Murder Spree Kills Himself*]. Investigators theorized that Soltys stabbed his pregnant wife first, drove twenty minutes to reach his uncle's house where he killed four other relatives, then drove to his mother's home to pick up his son. See Haussler, *supra*. He allegedly used toys to lure the boy into a cardboard packing box atop a garbage pile before killing him. *Id.* All victims had their throats slashed. See Bailey, *supra*; Haussler, *supra*. Suggesting that his relatives were killed for "poisoning" his reputation, Soltys told investigators that his wife had been disrespectful. See Bailey, *supra*. Notes scrawled on the back of family photographs indicate he had planned an order by which the murders should take place, and a numbered list referring to the slayings suggests each

killing his pregnant wife, son, and four other relatives, many point to postpartum psychosis as a gender-specific defense offering female criminals "special treatment" under the law.<sup>45</sup> Yates is portrayed as a hapless victim of circumstance by the National Organization for Women, while Soltys is shown as a deranged, knife-wielding maniac.<sup>46</sup> Nevertheless, their acts paint enigmatic pictures of the potentially monstrous nature of the human psyche.

Yet cases such as those of Susan Smith, Melissa Drexler, and Andrea Yates are neither rare aberrations of nature nor modern phenomena unique to the United States; rather, they are contemporary examples of the primeval practice of infanticide and neonaticides prevalent throughout world cultures. Historically, millions of babies in Europe were abandoned at the steps of foundling homes,<sup>47</sup> where they faced a meager survival rate of only twenty percent.<sup>48</sup> In China, female infants are com-

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victim had been killed for "speaking out." See Bailey, *supra*; Haussler, *supra*. Bruises on the body of Soltys' son indicate he had suffered physical abuse, and the family of Soltys' wife had previously accused Soltys of regularly beating her, even on one occasion attacking her with an ax. See Bailey, *supra*; Haussler, *supra*. Placed on the FBI's Ten Most Wanted List, Soltys evaded police in a national manhunt for ten days and was regarded as a "cold-blooded, calculated killer" so dangerous that anyone assisting him was "at risk of being his next victim." See Haussler, *supra*; *Suspect in Murder Spree Kills Himself*, *supra*. After his capture, Soltys committed suicide while in police custody by using makeshift rope from a plastic bag and strips of cloth. See Bailey, *supra*; *Suspect in Murder Spree Kills Himself*, *supra*. Though Soltys reportedly suffered some sort of mental illness and had a history of depression, the circumstances surrounding the killings he committed were not the same as that of Andrea Yates and cannot be compared as such. See Kathleen Parker, *Flip-Flop Logic a Red Herring to Justice*, ARIZ. DAILY STAR, Sept. 4, 2001, at B7, available at 2001 WL 10344669. Though both sexes should be treated equally under the law, women and men "are not the same nor are their behaviors likely to be the same even under similar circumstances." *Id.*

45. See Herbert, *supra* note 38; Martin Kasindorf, *Calif. Suffers Bloody Summer*, USA TODAY, Sept. 11, 2001, at 3A, available at 2001 WL 5471169; *No Excuse for Killing Children*, USA TODAY, June 27, 2001, at A14, available at 2001 WL 5465696; Thomas, *supra* note 38.

46. See Herbert, *supra* note 38; Kasindorf, *supra* note 45; Don Lopez, *NOW Shows It Doesn't Want Equal Treatment for Women*, DENVER POST, Sept. 12, 2001, at B12, available at 2001 WL 27665093; *No Excuse for Killing Children*, *supra* note 45.

47. See SARAH BLAFFER HRDY, *MOTHER NATURE: A HISTORY OF MOTHERS, INFANTS, AND NATURAL SELECTION* 299-300 (1999); Caba, *supra* note 34. Foundling homes function similarly to orphanages that take in abandoned children, to "prevent the frequent murders of poor, miserable infants at their birth" and "suppress the inhuman custom of exposing new-born infants to perish in the streets." William L. Langer, *Infanticide: A Historical Survey*, HIST. CHILDHOOD Q., Winter 1973, at 353, 358.

48. See HRDY, *supra* note 47, at 301 (mentioning a mortality rate of eighty-one percent at foundling homes due to inadequate care and neglect); Branson, *supra* note 34; Caba, *supra* note 34. Foundling homes were well-known for their ignorant treatment and intentional neglect of abandoned infants; the situation was so dire in "these horrible



monly killed on the basis of their sex, an illegal practice that the Chinese government is still trying to curb today.<sup>49</sup> During the 1930s, almost every mother in a Bolivian village killed her newborn "when prospects of raising a child with a suitable father were extremely poor."<sup>50</sup> Though fathers are purportedly more likely to kill their offspring, approximately 200 children are killed by their mothers every year in the United States.<sup>51</sup>

Psychologists have termed acts of infanticide, characterized by the mother blaming the Devil or claiming to have acted under the belief that she was actually saving her children from woeful lives by sending them to heaven, as "altruistic killings."<sup>52</sup> However, is there evidence of mental illness for such killings, or are these "killer moms" simply trying to get away with murder? And what should be the law's response to such justifications? This comment investigates the use of postpartum psychosis as a legitimate means of negating the criminal responsibility component of a charge of infanticide in Texas.

Part I examines the roots and myths surrounding infanticide from a contemporary perspective. Tracing the slaughter of children throughout history and literature, Part I reveals the functions and reasons behind the ancient practice of infanticide.

Part II discusses the medical debate regarding the causes of postpartum psychosis. Providing a medical definition of postpartum depression, Part II briefly describes the three categories of postpartum disorders and their effects on the mother. Characterizing postpartum psychosis as a disease afflicting the mind, Part II also examines evidence of mental illness associated with postpartum disorders, as well as the necessary steps toward their detection and treatment.

Part III explores the special problems faced by a defendant using postpartum psychosis as a defense. Chronicling the initial considerations of the defense attorney and the special defense problems he must confront, Part III evaluates the legal recognition of postpartum psychosis as a defense in terms of both its usage and success rates. Analyzing postpartum depression to determine whether it meets the legal test of insanity, Part

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receptables" that they were associated with "legalized infanticide." Langer, *supra* note 47, at 359.

49. See *Chinese Woman Drowns Granddaughter in Quest for Grandson*, AGENCY FRANCE-PRESSE, Aug. 9, 2001, available at 2001 WL 24987279; Evan Thomas, *Motherhood and Murder*, NEWSWEEK, July 2, 2001, at 20, 23, available at 2001 WL 19504939.

50. Caba, *supra* note 34; see HRDY, *supra* note 47, at 314; Branson, *supra* note 34.

51. See Schindehette et al., *supra* note 3, at 52; Thomas, *supra* note 49, at 22; see also CHARLES PATRICK EWING, *FATAL FAMILIES: THE DYNAMICS OF INTRAFAMILIAL HOMICIDE* 95-96 (1997).

52. See John Sullivan, *Stressor Often Prompts Killings*, NEWS & OBSERVER (Raleigh, N.C.), July 1, 2001, at A1, available at 2001 WL 3472005; Thomas, *supra* note 49, at 22.

III compares the English common law to the American perspective of infanticide. Part III examines the concept of diminished responsibility and other factors of the insanity defense, particularly the effects of postpartum psychosis on the defendant's competency to stand trial and the requisite voluntariness requirement of criminal responsibility. Four tests are examined in detail during this discussion of the insanity defense—the *M'Naghten* test,<sup>53</sup> the American Law Institute Model Penal Code test,<sup>54</sup> the "Irresistible Impulse" test,<sup>55</sup> and the Durham or "Product" test.<sup>56</sup>

Part IV looks to the effects of gender on criminal law, specifically from the sentencing perspective. Discussing various theories of punishment, Part IV compares sentencing for maternal as opposed to paternal infanticides and examines how mothers are punished under the current Texas justice system. In viewing postpartum psychosis as a gender-specific defense, Part IV determines whether gender is a relevant factor in the charge of murder. Part IV examines the validity of postpartum psychosis as an "Excuse" defense,<sup>57</sup> along with the partial defense of "Extreme Mental and Emotional Disturbance."<sup>58</sup> By presenting current case law that raises postpartum psychosis as a defense, Part IV examines automatic insanity presumptions as well as complete rejections of such a defense. Evaluating current Congressional bills regarding postpartum disorders, Part IV also addresses the Texas approach to postpartum psy-

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53. See WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 310-20 (2d ed. 1986); *Access Issues*, 24 MENTAL & PHYSICAL DISABILITY L. REP. 706, 714 (2000); Emily S. Pollock, Note, *Those Crazy Kids: Providing the Insanity Defense in Juvenile Courts*, 85 MINN. L. REV. 2041, 2061 (2001).

54. See LAFAYE & SCOTT, JR., *supra* note 53, at 329-30; Michelle Migdall Gee, Annotation, *Modern Status of Test of Criminal Responsibility—State Cases*, 9 A.L.R. 4th 526, 536 (1981); Bageshree V. Ranade, Comment, *Conceptual Ambiguities in the Insanity Defense: State v. Wilson and the New "Wrongfulness" Standard*, 30 CONN. L. REV. 1377, 1390 (1998).

55. See LAFAYE & SCOTT, JR., *supra* note 53, at 310, 320-22; Maureen P. Coffey, Note, *The Genetic Defense: Excuse or Explanation?*, 35 WM. & MARY L. REV. 353, 387 (1993); Laura Reider, Comment, *Toward a New Test for the Insanity Defense: Incorporating the Discoveries of Neuroscience into Moral and Legal Theories*, 46 UCLA L. REV. 289, 307 (1998).

56. See LAFAYE & SCOTT, JR., *supra* note 53, at 323-29; Richard Lowell Nygaard, *On Responsibility: Or, the Insanity of Mental Defenses and Punishment*, 41 VILL. L. REV. 951, 967 (1996); Phillip E. Hassman, Annotation, *Drug Addiction or Related Mental State as Defense to Criminal Charge*, 73 A.L.R. 3d 16, 64 (1976).

57. See Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks Is Just?: Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839, 1842 (2000); Choua Ly, Comment, *The Conflict Between Law and Culture: The Case of the Hmong in America*, 2001 WIS. L. REV. 471, 488.

58. See 40 AM. JUR. 2D *Homicide* § 240 n.22 (1999); *Case Law Development: Criminal Responsibility/Mitigation in Sentencing*, 25 MENTAL & PHYSICAL DISABILITY L. REP. 371, 378 (2001).

chosis, as related to mental illness through the Texas Mental Health Code<sup>59</sup> and the Texas Penal Code.

Part V advocates proposed approaches to the defense of postpartum psychosis by either changing the burden of proof or considering such a defense as a mitigating factor at sentencing, if not both; it advocates the possibility of manslaughter for infanticide and involuntary manslaughter for neonaticide. Lastly, the Texas Penal Code and proposed amendments are analyzed and compared to the "guilty but mentally ill" standard<sup>60</sup> of other states, as well as the Model Penal Code. Part V ultimately looks to various statutes—state, federal, and foreign—for possible answers to the puzzle of postpartum psychosis in Texas courts today.

## II. ROOTS AND MYTHS OF INFANTICIDE: A CONTEMPORARY PERSPECTIVE

*"Powerless women have always used mothering as a channel—narrow but deep—for their own human will to power."*<sup>61</sup>

Adrienne Rich, twentieth-century writer

Psychological and sociological analysis can help us understand the factors that shape the way we regard and treat those who commit infanticide, both in practice and in law. Stories throughout our history and literature<sup>62</sup> provide rich insights. Furthermore, examination of our his-

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59. The Texas Mental Health Code is found within Subtitle C., Title 7 of the Mental Health and Mental Retardation section of the Health and Safety Code. See TEX. HEALTH & SAFETY CODE ANN. § 571.001 (Vernon 2001). Section 571.001, Short Title, notes "this subtitle may be cited as the Texas Mental Health Code." *Id.*

60. See William B. Bystrynski, Note, *Riggins v. Nevada: Toward a Standard for Medicating the Incompetent Defendant to Competence*, 71 N.C. L. REV. 1206, 1223 n.122 (1993); Carol A. Gaudet, Note, *Linking Genes with Behavior: The Social and Legal Implications of Using Genetic Evidence in Criminal Trials*, 24 FORDHAM URB. L.J. 597, 615 (1997).

61. PATRICIA PEARSON, *WHEN SHE WAS BAD: HOW AND WHY WOMEN GET AWAY WITH MURDER* 92 (1998).

62. Underlying incentives for infanticide are echoed in literature, which captures society's reaction and treatment of mothers who murder their own children. In Greek and Roman mythology, newborns left for exposure grew up to be heroes, such as Oedipus, Ion, and the twin founders of Rome, Romulus and Remus, who extracted revenge upon their parents for their abandonment. See ABBOTT ET AL., *HISTORY OF ROMULUS* 142 (1962); ALBERT COOK, *OEDIPUS REX: MIRROR FOR GREEK DRAMA* 35 (1965); 4 EURIPIDES 145 (Arthur S. Way trans., 1922); HOW ET AL., *A HISTORY OF ROME* 21 (1915). Whereas the Bible tells the story of Moses, fairy tales like Hansel and Gretel touch upon the social problem of abandoned children at the time, particularly by the poor, and about wicked stepmothers who plot sinister schemes against their step-children, as in Snow White and Cinderella. See *Exodus* 1:22-2:4 (King James); 1 GRIMM'S *HOUSEHOLD TALES* 93-95, 208 (Margaret Hunt ed. & trans., 1884); *TALES OF GRIMM AND ANDERSEN* 114-15 (Frederick Jacobi, Jr., ed., 1952).

tory will enable us to comprehend the contrast between foreign laws and the treatment of infanticide under American jurisprudence.

As the most prevalent violent crime committed by women,<sup>63</sup> the killing of children occurred throughout history for various reasons: sacrifice, birth control, eugenics, shame, or fear of punishment for adultery.<sup>64</sup> Infanticide has been so universal that it "has been practiced on every continent and by people on every level of cultural complexity, from hunters and gatherers to high civilizations, including our own ancestors. Rather than being an exception, then, it has been the rule."<sup>65</sup> Since Upper Paleolithic times, tribal cultures have enforced social policies to destroy unhealthy, handicapped infants and children born without parental support.<sup>66</sup> This practice was most widely exercised among nomadic people to restrict population so as to meet nursing obligations and mobility requirements of the group as a whole.<sup>67</sup>

In ancient Greece and Rome, exposure<sup>68</sup> of newborns was permitted and even enforced by law to dispose of the weak or the deformed, either due to their imperfections or for fear that they would become burdens upon the State.<sup>69</sup> Even the prominent Greek philosopher Plato advocated the extermination of infants "begotten by inferior parents[;]"<sup>70</sup> likewise, Aristotle considered exposure to be the best method for curbing overpopulation and controlling sex selection.<sup>71</sup>

63. See LITA LINZER SCHWARTZ & NATALIE K. ISSER, *ENDANGERED CHILDREN: NEONATICIDE, INFANTICIDE, AND FILICIDE* 2-3 (2000) (describing gender and child homicide); L. Minturn & J.H. Davis, *Infanticide as a Terminal Abortion Procedure*, *BEHAV. SCI. RES.*, Spring/Summer 1982, at 70, 75-83 (providing results of a study of infanticide).

64. See SCHWARTZ & ISSER, *supra* note 63, at 2; Mary E. Lentz, *A Postmortem of the Post Partum Psychosis Defense*, 18 *CAP. U. L. REV.* 525, 526 (1989); Susan C.M. Scrimshaw, *Infanticide in Human Populations: Societal and Individual Concerns*, in GLENN HAUSFATER & SARAH BLAFFER HRDY, *INFANTICIDE: COMPARATIVE AND EVOLUTIONARY PERSPECTIVES* 439, 453 (1984).

65. Laila Williamson, *Infanticide: An Anthropological Analysis*, in *INFANTICIDE AND THE VALUE OF LIFE* 61, 61 (Marvin Kohl ed., 1978); see Scrimshaw, *supra* note 64, at 439.

66. See A.M. CARR-SAUNDERS, *THE POPULATION PROBLEM: A STUDY IN HUMAN EVOLUTION* 168, 216 (1922); SCHWARTZ & ISSER, *supra* note 63, at 23.

67. See CARR-SAUNDERS, *supra* note 66, at 216; SCHWARTZ & ISSER, *supra* note 63, at 23; Williamson, *supra* note 65, at 66.

68. Exposure can be defined as a form of deliberate infanticide by intentionally placing the child in a dangerous situation where he will most likely succumb either to harsh climate or ravenous animals. See *THE CONCISE OXFORD DICTIONARY* 412 (8th ed. 1990); Scrimshaw, *supra* note 64, at 453.

69. See SCHWARTZ & ISSER, *supra* note 63, at 4; Lentz, *supra* note 64, at 526; Scrimshaw, *supra* note 64, at 439.

70. See SCHWARTZ & ISSER, *supra* note 63, at 4; Langer, *supra* note 47, at 353-66.

71. See SCHWARTZ & ISSER, *supra* note 63, at 4; Sarah B. Pomeroy, *Infanticide in Hellenistic Greece*, in *IMAGES OF WOMEN IN ANTIQUITY* 207, 207-19 (A. Cameron & A.

The Asian continent was also no exception to the widespread practice of infanticide; this practice flourished in the South Sea Islands, Melanesia, and Polynesia.<sup>72</sup> Although prohibited by both Buddhism and Taoism, most people did not think of infanticide as a serious wrong.<sup>73</sup> In India, wealth and high social status in the caste system was integral to the survival of the family unit.<sup>74</sup> Since the great cost of dowries impeded the accumulation of wealth, higher caste families often killed their female infants.<sup>75</sup> Comparatively, the Chinese saw sons as the only means of support for parents in their old age.<sup>76</sup> Daughters were burdens unless they can provide upward social mobility through marriage by allying their families with those who were more powerful or wealthy.<sup>77</sup> Similarly, infanticide was practiced in Japan to both reduce the size of families and to increase their standard of living.<sup>78</sup>

During the Middle Ages, Europe associated infanticide with other crimes that challenged the established social order, such as parricide, heresy, witchcraft, and murder.<sup>79</sup> Similarly, the Catholic Church condemned infanticide and was more concerned that the practice was evidence of

Kuhrt eds., 1993)(observing social historians note more daughters than sons have been selected for infanticide).

72. See MICHAEL TOOLEY, *ABORTION AND INFANTICIDE* 315 (1983); Williamson, *supra* note 65, at 64. Infanticide is defined as the murder of a child at/or less than one year old, while neonaticide refers to the killing of a newborn within hours of his birth. See SCHWARTZ & ISSER, *supra* note 63, at 1. According to *Webster's New World Dictionary of American English*, "infanticide" is simply "the murder of a baby." WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 691 (Victoria Neufeldt ed., 1988).

73. See TOOLEY, *supra* note 72, at 316; Williamson, *supra* note 65, at 64 (describing the cultural belief that a child is not fully human until accepted as a member of the social group).

74. See CHERYL L. MEYER ET AL., *MOTHERS WHO KILL THEIR CHILDREN* 5 (2001) (explaining the importance of the financial value of a dowry as a symbol of social status in keeping the family from social ostracism).

75. See SCHWARTZ & ISSER, *supra* note 63, at 26; TOOLEY, *supra* note 72, at 316 (noting infanticide as an accepted and common practice among various castes in Indian society).

76. See MEYER ET AL., *supra* note 74, at 6 (explaining why sons are preferred over daughters through the traditional Chinese societal structure).

77. See SCHWARTZ & ISSER, *supra* note 63, at 26; see also Lentz, *supra* note 64, at 526 (noting that Chinese peasantry practiced infanticide also as a method by which to maintain basic means of survival).

78. See SCHWARTZ & ISSER, *supra* note 63, at 27; Lentz, *supra* note 64, at 526. In fact, the Japanese term for infanticide, practiced for economic and demographic reasons, means "weeding" or "thinning rice seedlings." See Williamson, *supra* note 65, at 64.

79. See LILLIAN CORTI, *THE MYTH OF MEDEA AND THE MURDER OF CHILDREN* 24 (1998) (observing the prevailing theme of witchcraft in all versions of stories regarding Medea, the first mother said to have committed infanticide); SCHWARTZ & ISSER, *supra* note 63, at 27 (explaining how infanticide was viewed during the Middle Ages).

adultery or illegitimacy rather than the crime of murder.<sup>80</sup> In large households, the children's welfare rested primarily upon their parents, who generally felt that killing a baby was no different from slaughtering livestock for the sake of the family's survival as a whole.<sup>81</sup>

In the United States, poverty, rather than shame, was the impetus for infanticide in the nineteenth century.<sup>82</sup> Like the parks and ditches of London, dead infants were a common sight in cesspools and streets of Philadelphia.<sup>83</sup> Throughout our history, economic necessity, poverty, custom, and shame have been primary motivations for infanticide. One must question whether modern-day teenagers and mothers alike will resort to the established anthropological patterns of behavior when faced with the birth of a child and when desperate at dire economic circumstances and the lack of social support thereof.

### III. POSTPARTUM MOOD DISORDERS: THE MEDICAL DEBATE

*"The ideal mother has no interests of her own."*<sup>84</sup>

Alice Balin, psychoanalyst, 1974

#### A. *Diagnosis of Postpartum Mood Disorders*

Widely recognized as a legitimate mental illness since first diagnosed by Hippocrates in the fourth century, B.C.,<sup>85</sup> the concept of postpartum mood disorders is neither uncommon nor new. Approximately fifty to

80. See SCHWARTZ & ISSER, *supra* note 63, at 27; Lentz, *supra* note 64, at 527 (describing infanticide as a crime particular to females from their "tendency for lechery, passion, and lack of responsibility").

81. See SCHWARTZ & ISSER, *supra* note 63, at 29; Williamson, *supra* note 65, at 63 (describing infanticide as a caring act to save the lives of older siblings who are already established as members of the social group as opposed to an act carried out due to lack of love for children).

82. See SCHWARTZ & ISSER, *supra* note 63, at 31; Williamson, *supra* note 65, at 65-66 (observing that illegitimate children are usually looked down upon and treated as outcasts, particularly in patrilineal social structures). The underlying motives of infanticide in the United States were similar to that of Europe, though usually due to poverty rather than the shame of illegitimacy. SCHWARTZ & ISSER, *supra* note 63, at 31.

83. See SCHWARTZ & ISSER, *supra* note 63, at 31; Scrimshaw, *supra* note 64, at 439; Langer, *supra* note 47, at 361. The British press denounced frequent findings of infant corpses in parks, ditches, cesspools, and under bridges as an "execrable system of whole-sale murder" that was "positively becoming a national institution." Langer, *supra* note 47, at 361.

84. PEARSON, *supra* note 61, at 92.

85. See ANN L. DUNNEWOLD, EVALUATION AND TREATMENT OF POSTPARTUM EMOTIONAL DISORDERS 1 (1997); EWING, *supra* note 51, at 62; Evelyn Attia et al., *Postpartum Psychosis*, in POSTPARTUM MOOD DISORDERS 99, 99 (Laura J. Miller ed., 1999). See generally ROBERT BINGHAM DOWNS, LANDMARKS IN SCIENCE: FROM HIPPOCRATES TO CAR-

eighty percent of new mothers experience some degree of depression after giving birth.<sup>86</sup> Out of that percentage, roughly one-sixth experience serious depression, characterized by major mood swings, anorexia, insomnia, and suicidal ideations.<sup>87</sup>

Only one or two mothers out of every one thousand actually experience postpartum psychosis during which they lose touch with reality.<sup>88</sup> Reflecting the social construction of motherhood and its constraints, new mothers are often reluctant to discuss or readily ignore symptoms of postpartum disorders, because mothers suffering from the disorder tend to feel guilty about having depressive or negative thoughts toward their children and do not want to be characterized as "bad mothers;" this causes them to eventually become isolated and non-communicative.<sup>89</sup> The American Psychiatric Association has recently recognized postpartum mood disorders in the *Diagnostic and Statistical Manual of Mental Disorders*, acknowledging the correlation between infanticide and symptoms of mental illness as defined by postpartum onset within four weeks of delivery.<sup>90</sup>

When delusions are present, they often concern the newborn infant (e.g., the newborn is possessed by the devil, has special powers, or is destined for a terrible fate). In both the psychotic and non-psychotic presentations, there may be suicidal ideation, obsessional thoughts regarding violence to the child, lack of concentration, and psychomotor agitation . . . . Infanticide is most often associated with postpartum psychotic episodes that are characterized by command hallucinations to kill the infant or delusions that the infant is possessed, but it can occur in severe postpartum mood episodes without such specific delusions or hallucinations.<sup>91</sup>

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SON 21 (1982) (crediting the Greek Hippocrates as the renowned "Father of Modern Medicine").

86. See EWING, *supra* note 51, at 61.

87. See *id.* at 61-62.

88. See DUNNEWOLD, *supra* note 85, at 40; EWING, *supra* note 51, at 62; Attia et al., *supra* note 85, at 101.

89. See AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 386 (4th ed. 1994); MEYER ET AL., *supra* note 74, at 77-79 (illustrating a case study of a mother suffering in silence from postpartum depression because she is trying to cope with the guilt and shame that arises from her negative feelings toward her newborn); Elizabeth K. Herz, *Prediction, Recognition, and Prevention, in POSTPARTUM PSYCHIATRIC ILLNESS: A PICTURE PUZZLE* 65, 65-66 (James Alexander Hamilton & Patricia Neel Harberger eds., 1992).

90. See AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 89, at 386; MEYER ET AL., *supra* note 74, at 11-12; see also EWING, *supra* note 51, at 62.

91. AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 89, at 386.

Yet despite its long "official" recognition, the nature of postpartum mood disorders is still not well understood. "Postpartum Depression" refers to several symptoms that a new mother may experience after giving birth and encompasses multiple mental disorders broadly categorized by the ambiguous and generic term of "postpartum depression onset."<sup>92</sup> However, because postpartum symptoms do not differ from those in non-postpartum mood episodes, mental health experts continue to debate whether postpartum depression is in fact a separate and distinct diagnostic entity.<sup>93</sup> Nevertheless, postpartum mood disorders range in severity from postpartum blues, to depression, and ultimately psychosis.<sup>94</sup>

Often known as the "Baby Blues," postpartum blues affects 85% of all new mothers within the first two weeks after delivery.<sup>95</sup> Characterized by tearfulness, headaches, irritability, and appetite changes, the relatively mild and transient symptoms of postpartum blues usually dissipate within two weeks to three months after giving birth and rarely lead to infanticide.<sup>96</sup> In fact, postpartum blues is considered so common that it is thought by many medical professionals to be a normal aspect of motherhood.<sup>97</sup>

Problems arise when what appears to be a mild case of the "baby blues" progresses into postpartum depression. Although, the symptoms are deceptively similar—tearfulness, irritability, and loss in appetite—postpartum depression causes the new mother to experience intense feel-

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92. See *id.*; EWING, *supra* note 51, at 62.

93. See AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 89, at 386; Ewing, *supra* note 51, at 62-63; MEYER ET AL., *supra* note 74, at 76; Laura J. Miller, *Introduction*, in POSTPARTUM MOOD DISORDERS xv, xvi-xvii (Laura J. Miller ed., 1999) (discussing whether postpartum depression is a distinct diagnosis, has a biological and/or symptom pattern distinction, or differs from nonpostpartum depression only by timing); see also DUNNEWOLD, *supra* note 85, at 2.

94. See AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 89, at 386; MEYER ET AL., *supra* note 74, at 76.

95. See MEYER ET AL., *supra* note 74, at 77; Miller, *supra* note 93, at xvii; see also DUNNEWOLD, *supra* note 85, at 28 (noting 80% of new mothers experience "Baby Blues" after delivery).

96. See DUNNEWOLD, *supra* note 85, at 28; MEYER ET AL., *supra* note 74, at 77; Laura J. Miller & Margaret Rukstalis, *Beyond the "Blues": Hypotheses About Postpartum Reactivity*, in POSTPARTUM MOOD DISORDERS 3, 4 (Laura J. Miller ed., 1999) (describing self-limiting characteristics in which symptoms dissipate without treatment after a short duration); Michael W. O'Hara, *The Nature of Postpartum Depressive Disorders*, in POSTPARTUM DEPRESSION AND CHILD DEVELOPMENT 3, 4 (Lynn Murray & Peter J. Cooper eds., 1997).

97. See DUNNEWOLD, *supra* note 85, at 28; MEYER ET AL., *supra* note 74, at 77; Jan L. Campbell, *Maternity Blues: A Model for Biological Research*, in POSTPARTUM PSYCHIATRIC ILLNESS: A PICTURE PUZZLE 90, 90 (James Alexander Hamilton & Patricia Neel Harberger eds., 1992); Miller & Rukstalis, *supra* note 96, at 3, 10.



ings of inadequacy and anxiety related to her ability to care for her newborn.<sup>98</sup> As such, she sees herself as an incompetent failure with a tremendous sense of fatigue and guilt about her inability to conform to personal or societal expectations of a "good mother."<sup>99</sup> This guilt compounds her suicidal ideations and thoughts about harming her child.<sup>100</sup> Affecting five to twenty percent of new mothers, postpartum depression usually develops within the first six months after delivery and results in at least some impairment of normal functioning.<sup>101</sup> Similar to depression that may occur at other times in life, postpartum depression persists for a minimum of several months and increases the new mother's vulnerability to future depressions.<sup>102</sup>

Postpartum depression can progress from a slow and gradual onslaught to rapid psychosis in which even the new mother may not notice the impairment in her thinking during its insidious onset.<sup>103</sup> Often dismissed as a case of "baby blues," postpartum psychosis is characterized by a severe break with reality and a severely impaired ability to function due to hallucinations or delusions, usually related to the newborn baby.<sup>104</sup> Hearing auditory hallucinations in which voices urge them to kill their children, new mothers typically exhibit strange behavioral tendencies in which they isolate themselves from others, stop speaking, suffer severe sleep depriva-

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98. See MEYER ET AL., *supra* note 74, at 77; see also DUNNEWOLD, *supra* note 85, at 31; O'Hara, *supra* note 96, at 4-5.

99. See DUNNEWOLD, *supra* note 85, at 31 (observing women suffering from postpartum depression tend to feel helpless and "fear that they do not have it in them to be good mothers, or to ever care for their infants 'in the right way'"); MEYER ET AL., *supra* note 74, at 77-79; Ricardo J. Fernandez, *Recent Clinical Management Experience*, in POSTPARTUM PSYCHIATRIC ILLNESS: A PICTURE PUZZLE 78, 82 (James Alexander Hamilton & Patricia Neel Harberger eds., 1992); Herz, *supra* note 89, at 65-66.

100. See DUNNEWOLD, *supra* note 85, at 31; MEYER ET AL., *supra* note 74, at 79; Fernandez, *supra* note 99, at 82; Herz, *supra* note 89, at 65-66.

101. See DUNNEWOLD, *supra* note 85, at 30-31; EWING, *supra* note 51, at 62-63; MEYER ET AL., *supra* note 74, at 77 (stating that symptoms include tearfulness, irritability, and intense feelings of inadequacy relating to the mother's ability to care for her child); O'Hara, *supra* note 96, at 4-5.

102. See SCHWARTZ & ISSER, *supra* note 63, at 105-06; O'Hara, *supra* note 96, at 12; Barbara L. Parry, *Postpartum Depression in Relation to Other Reproductive Cycle Mood Changes*, in POSTPARTUM MOOD DISORDERS 21, 27-47 (Laura J. Miller ed., 1999).

103. See DUNNEWOLD, *supra* note 85, at 30; Herz, *supra* note 89, at 72 (explaining the difference between postpartum psychosis and the blues as the symptoms of psychosis tending to worsen quickly with exacerbations of psychotic thinking and behavior through florid agitation, hallucinations, and delusions weeks or months after delivery).

104. See DUNNEWOLD, *supra* note 85, at 41; MEYER ET AL., *supra* note 74, at 12, 77; O'Hara, *supra* note 96, at 4; see also Herz, *supra* note 89, at 65 (recounting a new mother's experience with postpartum depression).

tion, and/or undergo extreme emotional volatility.<sup>105</sup> However, these symptoms disappear within several months of onset, even if untreated.<sup>106</sup>

Additionally, there is a thirty to fifty percent risk that episodes of postpartum psychosis will recur with each subsequent delivery—a risk particularly elevated for women with prior histories of postpartum mood disorders.<sup>107</sup> Affecting one or two mothers out of one thousand births, postpartum psychosis includes feelings of helplessness, obsessional thinking, infanticidal fantasies, and ultimately infanticide itself.<sup>108</sup> Mothers may have delusions of guilt, fear about the infants' health, and regrets about the possible harmful effects of their behavior on the infants through distorted expectations, agitation, disorientation, confusion, sadness, and anxiety.<sup>109</sup>

A typical example of how postpartum psychosis leads to infanticide can be illustrated in the case of Angela Thompson. Thompson gave birth to a daughter and developed sleeping problems a few months later.<sup>110</sup> As she came to believe that she no longer needed sleep, Thompson began to experience hallucinations of a religious nature, particularly related to

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105. See MEYER ET AL., *supra* note 74, at 12; SCHWARTZ & ISSER, *supra* note 63, at 106; O'Hara, *supra* note 96, at 4 (describing the mother's catatonic state).

106. See MEYER ET AL., *supra* note 74, at 12; O'Hara, *supra* note 96, at 12.

107. See AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 89, at 386-87; DUNNEWOLD, *supra* note 85, at 41 (noting that mothers with a family or personal history of bipolar illness are at such significantly greater risk that they must be monitored by a mental health professional for development of postpartum psychosis both before and after childbirth); EWING, *supra* note 51, at 62; SCHWARTZ & ISSER, *supra* note 63, at 107; Meir Steiner & William Y.K. Tam, *Postpartum Depression in Relation to Other Psychiatric Disorders*, in POSTPARTUM MOOD DISORDERS 48 (Laura J. Miller ed., 1999).

108. See DUNNEWOLD, *supra* note 85, at 40; MEYER ET AL., *supra* note 74, at 12; Attia et al., *supra* note 85, at 101.

109. See DUNNEWOLD, *supra* note 85, at 41; MEYER ET AL., *supra* note 74, at 12; Attia et al., *supra* note 85, at 103; O'Hara, *supra* note 96, at 4.

110. See EWING, *supra* note 51, at 63-65; Anne Damante Brusca, *Postpartum Psychosis: A Way Out for Murderous Moms?*, 18 HOFSTRA L. REV. 1133, 1164 (1990); Lori But-ton, *Postpartum Psychosis: The Birth of a New Defense?*, 6 COOLEY L. REV. 323, 332-33 (1989); Tricia L. Schroeder, *Postpartum Psychosis as a Defense for Murder*, 21 W. ST. U. L. REV. 267, 282-83 (1993) (noting Thompson's psychotic delusions, hallucinations, and obsessions with the devil reappeared with deadly force when left untreated after her second child Michael was born); Debora K. Dimino, Comment, *Postpartum Depression: A Defense for Mothers Who Kill Their Infants*, 30 SANTA CLARA L. REV. 231, 251 (1990); Laura E. Reece, Comment, *Mothers Who Kill: Postpartum Disorders and Criminal Infanticide*, 38 UCLA L. REV. 699, 750 (1991) (observing Thompson clearly suffered from postpartum psychosis after the birth of her first child).

darkness and evil.<sup>111</sup> As her psychosis grew, Thompson tried to throw herself off a bridge and subsequently was hospitalized repeatedly.<sup>112</sup>

Upon her discharge, Thompson seemed to have resumed her normal functions and appeared to have recovered completely,<sup>113</sup> but the delusions and hallucinations returned after the birth of her son two years later.<sup>114</sup> Thompson again became psychotic and harbored a constant obsession with the Devil.<sup>115</sup> Preoccupied and completely self-absorbed, she barely spoke and remained in a catatonic state.<sup>116</sup>

One afternoon after her husband returned from work, Thompson greeted her husband at the door and calmly told him that their newborn son was dead.<sup>117</sup> The newborn's body was covered with a towel, and Thompson readily admitted to having drowned the child in the bathtub.<sup>118</sup> She claimed she heard the voice of God saying that her son was the Devil and, if she killed the child, her husband would raise him from the dead three days later so the world would thereafter recognize her son

111. See EWING, *supra* note 51, at 63-65; Brusca, *supra* note 110, at 1164; Schroeder, *supra* note 110, at 282-83; Reece, *supra* note 110, at 706 (explaining Thompson shouted hymns and switched on lights in her attempts to drive out evil forces from her house); Barbara E. Rosenberg, Comment, *Postpartum Psychosis as a Defense to Infant Murder*, 5 *TOURO L. REV.* 287, 302-03 (1989) (observing some medical professionals still mistakenly believe postpartum disorders to be merely psychological).

112. See EWING, *supra* note 51, at 63-65; Brusca, *supra* note 110, at 1164; Button, *supra* note 110, at 332-33; Amy L. Nelson, *Postpartum Psychosis: A New Defense?*, 95 *DICK. L. REV.* 625, 631 (1991); Schroeder, *supra* note 110, at 282-83; Dimino, *supra* note 110, at 251.

113. See EWING, *supra* note 51, at 63-65; Brusca, *supra* note 110, at 1164; Button, *supra* note 110, at 333; Schroeder, *supra* note 110, at 282-83; Reece, *supra* note 110, at 706 (noting even Thompson's doctors saw "no reason why it [postpartum psychosis] should happen again").

114. See EWING, *supra* note 51, at 63-65; Button, *supra* note 110, at 333; Schroeder, *supra* note 110, at 282-83; Dimino, *supra* note 110, at 251; Reece, *supra* note 110, at 706.

115. See EWING, *supra* note 51, at 63-65; Schroeder, *supra* note 110, at 282-83; Reece, *supra* note 110, at 706.

116. See EWING, *supra* note 51, at 63-65; Schroeder, *supra* note 110, at 282-83.

117. See EWING, *supra* note 51, at 63-65; Schroeder, *supra* note 110, at 282-83. Thompson recounted the event:

I started becoming delusional after I stopped nursing Michael. I thought somehow that he represented the Devil . . . The morning the baby died, I got a phone call from a woman selling magazines. Right before she hung up, I thought she said, "All right, Angela." I had been praying and asking God for guidance, and I thought that was God telling me to drown the baby. I filled the tub, put the baby in the water and held him down until he drowned . . . He was an easy baby, a good baby, he was perfect.

Schroeder, *supra* note 110, at 282-83 (ellipses in original).

118. See EWING, *supra* note 51, at 63-65; Button, *supra* note 110, at 332; Nelson, *supra* note 112, at 631; Schroeder, *supra* note 110, at 282-83; Dimino, *supra* note 110, at 251; Reece, *supra* note 110, at 706.

as Jesus Christ.<sup>119</sup> Obvious similarities are shared between this case and that of Yates'.<sup>120</sup>

### B. *Etiology of Postpartum Depression*

Beginning early in her pregnancy, a woman experiences a myriad of discomforts related to hormonal and physical changes in her body over the course of the next forty weeks that result in her feeling that her body is not her own.<sup>121</sup> Levels of progesterone and estrogen rise dramatically, growing twenty to thirty times the normal amount by the second trimester of her pregnancy.<sup>122</sup> As prolactin and adrenal hormone levels increase and the amount of circulating blood doubles, the woman experiences extreme physical changes as her uterus, chest, and breasts grow heavy.<sup>123</sup> After birth, these changes reverse with dramatic speed. Progesterone levels plummet to zero within a week, and estrogen declines to 1/200th of what was maintained during the pregnancy.<sup>124</sup> The new mother is fatigued and perhaps feverish from the labor of childbirth and may be in pain from continued contractions, perineal bruises, tears, stitches, and hemorrhoids.<sup>125</sup> Her gastrointestinal tract is sluggish from

119. See EWING, *supra* note 51, at 63-65; Brusca, *supra* note 110, at 1164; Button, *supra* note 110, at 332; Nelson, *supra* note 112, at 631 (recalling Thompson described Michael's face as being contorted like the Devil's even after he was dead); Schroeder, *supra* note 110, at 282-83; Dimino, *supra* note 110, at 251; Rosenberg, *supra* note 111, at 297. In Thompson's delusional state, the act of infanticide "must have seemed to be the very essence of what was right." Nelson, *supra* note 112, at 638. Under such circumstances, how can knowledge of right from wrong under the *M'Naghten* test be more clearly displaced?

120. Aside from the striking parallels between the facts of their cases, Thompson, like Yates, also worked as a registered nurse. See Schroeder, *supra* note 110, at 282.

121. See DUNNEWOLD, *supra* note 85, at 9; Roberta J. Apfel & Maryellen H. Handel, *Couples Therapy for Postpartum Mood Disorders*, in *POSTPARTUM MOOD DISORDERS* 163, 164 (Laura J. Miller ed., 1999) (describing changes that occur during pregnancy).

122. See DUNNEWOLD, *supra* note 85, at 9; Victoria Hendrick & Lori L. Altshuler, *Biological Determinants of Postpartum Depression*, in *POSTPARTUM MOOD DISORDERS* 65, 68 (Laura J. Miller ed., 1999) (noting that, while progesterone and estrogen levels peak near term, they drop 200-fold immediately after delivery); O'Hara, *supra* note 96, at 14-16 (confirming levels of progesterone and estradiol dramatically drop by as much as ninety to ninety-five percent after delivery). Progesterone and estrogen have been linked to mood or psychobiological well-being while levels of serotonin have been correlated to violent behavior. See Hendrick & Altshuler, *supra*, at 68.

123. See DUNNEWOLD, *supra* note 85, at 9; Hendrick & Altshuler, *supra* note 122, at 72 (discussing changes due to prolactin levels); O'Hara, *supra* note 96, at 16-17.

124. See DUNNEWOLD, *supra* note 85, at 9; Hendrick & Altshuler, *supra* note 122, at 67-68; O'Hara, *supra* note 96, at 15-16.

125. See DUNNEWOLD, *supra* note 85, at 9-10; Apfel & Handel, *supra* note 121, at 163-64.

the effects of progesterone, making constipation likely.<sup>126</sup> The muscles of her birth canal are soft and enlarged as to affect her control of urination.<sup>127</sup> When her milk "comes in," the new mother's breasts become firmer, larger, and increasingly tender, even painful at times.<sup>128</sup>

All of these changes to a mother's body often affect her self-image as they continue well into the first postpartum year.<sup>129</sup> Facing the challenges of the normal day-to-day tasks of motherhood, the mother may develop expectations for her "performance," fearing that she may have failed in some way.<sup>130</sup> Rather than seeing parenting as relatively temporary in nature, the new mother may feel powerless since she now must neglect her own needs to the point of physical or emotional exhaustion which contributes to postpartum psychiatric disorders.<sup>131</sup>

Several endocrine glands and their hormones play specific roles in the development of postpartum illness. In a simplified picture, the high levels of hormones during pregnancy appear to be maintained by the high levels of placenta-produced hormones, particularly estrogen.<sup>132</sup> The fall of estrogen initiated by delivery sets into motion a chain of responses that eventually diminish the production of hormones produced by the anterior pituitary.<sup>133</sup> The pituitary gland is a small mass of tissue that lies directly under the brain which secretes more than a dozen hormones that in turn stimulate and control activities of several glands and processes throughout the body.<sup>134</sup> The reduction of hormones secreted by the anterior pi-

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126. See DUNNEWOLD, *supra* note 85, at 9.

127. See *id.*; Apfel & Handel, *supra* note 121, at 163-64.

128. See DUNNEWOLD, *supra* note 85, at 9.

129. See *id.*; see also Apfel & Handel, *supra* note 121, at 163-64.

130. See DUNNEWOLD, *supra* note 85, at 10-11; PAULA NICOLSON, POST-NATAL DEPRESSION 108-09 (1998).

131. See DUNNEWOLD, *supra* note 85, at 12; NICOLSON, *supra* note 130, at 108-09.

132. See DUNNEWOLD, *supra* note 85, at 13-16; SCHWARTZ & ISSER, *supra* note 63, at 105; Robert B. Filer, *Endocrinology of the Postpartum Period*, in POSTPARTUM PSYCHIATRIC ILLNESS: A PICTURE PUZZLE 153, 153-60 (James Alexander Hamilton & Patricia Neel Harberger eds., 1992); Hendrick & Altshuler, *supra* note 122, at 66; O'Hara, *supra* note 96, at 15-16.

133. See DUNNEWOLD, *supra* note 85, at 13-16; Hendrick & Altshuler, *supra* note 122, at 75-76; O'Hara, *supra* note 96, at 14-15; see also SCHWARTZ & ISSER, *supra* note 63, at 105.

134. See DUNNEWOLD, *supra* note 85, at 13-16 (noting hypothalamic-pituitary-adrenal axis in endocrinological changes during pregnancy is implicated as one of the primary variants which causes postpartum mood disorders); J.C. Davis & M.T. Abou-Saleh, *Psychiatric Manifestations in Patients with Postpartum Hypopituitarism*, in POSTPARTUM PSYCHIATRIC ILLNESS: A PICTURE PUZZLE 191, 196-99 (James Alexander Hamilton & Patricia Neel Harberger eds., 1992) (observing the anterior pituitary secretes hormones, particularly the adrenocorticotrophic hormone (ACTH) and thyroid stimulating hormone, which control lactation, the adrenal cortex, pigmentation of the skin, and the growth of bones and muscles); Hendrick & Altshuler, *supra* note 122, at 75-76 (speculating oxytocin, a posterior

pituitary consequently causes a decrease in cortisol and thyroxine, both of which are essential to proper cell function.<sup>135</sup> Substantial evidence reveals that relative deficits of these hormones lead to the symptoms of postpartum mood disorders.<sup>136</sup> Though certain studies have been inconclusive, experts have postulated that postpartum mood disorders arise from a unique integration of hormone functions and interactions in the placenta, pituitary, thyroid, and adrenal cortex.<sup>137</sup>

Other risk factors may also be significant causal elements of postpartum mood disorders. A family history of depression and anxiety is an inherited biological factor that is usually an efficient predictor of postpartum depression and psychosis.<sup>138</sup> Similarly, psychosocial risk factors, such as stressful life events, a strained marital relationship, and a lack of social support, increase the woman's vulnerability to postpartum emotional distress, particularly when coupled with an existing predisposition to depression.<sup>139</sup>

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pituitary hormone, is associated with coping, depression, and feelings of helplessness); O'Hara, *supra* note 96, at 14-15; *see also* SCHWARTZ & ISSER, *supra* note 63, at 105 (noting postpartum psychiatric illness is "biopsychosocial" in nature, rooted in the biochemical, psychological, emotional, and social changes a new mother experiences after childbirth).

135. *See* DUNNEWOLD, *supra* note 85, at 13-14 (asserting pregnancy shuts off essential production of corticotropin-releasing hormone (CRH), prompting cortisol release, thus leading to depressed postpartum mood); Davis & Abou-Saleh, *supra* note 134, at 198 (hypothesizing that sudden and dramatic drops in hormones expose supersensitive postsynaptic receptors, which provide a trigger mechanism for postpartum psychiatric illness in women predisposed to development of bipolar disorders); Hendrick & Altshuler, *supra* note 122, at 69-71; O'Hara, *supra* note 96, at 14-15 (analogizing the hypothesis implicating cortisol as the cause of postpartum psychiatric illness to the theory that cortisol is a factor in premenstrual syndrome and menopause); *see also* SCHWARTZ & ISSER, *supra* note 63, at 105.

136. *See* Davis & Abou-Saleh, *supra* note 134, at 198 (arguing that a rapid drop in levels of cortisol and thyroxine during the postpartum period, coupled with transient hypopituitarism, triggers postpartum psychosis as a corollary to the thesis behind the premenstrual relapse of postpartum psychosis); Hendrick & Altshuler, *supra* note 122, at 66; O'Hara, *supra* note 96, at 14-16; *see also* DUNNEWOLD, *supra* note 85, at 13; SCHWARTZ & ISSER, *supra* note 63, at 105.

137. *See* DUNNEWOLD, *supra* note 85, at 16 (reporting postpartum psychosis is likely to be biological in origin and can be effectively treated with thyroid hormone, a combination of thyroid hormone and antidepressant medication, or estrogen therapy); Campbell, *supra* note 97, at 93-99; Hendrick & Altshuler, *supra* note 122, at 66; O'Hara, *supra* note 96, at 14-18; *see also* SCHWARTZ & ISSER, *supra* note 63, at 105.

138. *See* DUNNEWOLD, *supra* note 85, at 17; Attia et al., *supra* note 85, at 108; O'Hara, *supra* note 96, at 21.

139. *See* DUNNEWOLD, *supra* note 85, at 16-24; Attia et al., *supra* note 85, at 107-08 (asserting epidemiologic studies found the stated risk factors to be associated with the development of postpartum psychiatric illness); O'Hara, *supra* note 96, at 19-20.

### C. *Treatment of Postpartum Mood Disorders*

Patients diagnosed with postpartum depression generally receive the same treatment as other non-postpartum patients suffering from depression. This entails a variety of interpersonal psychotherapy, couples therapy, pharmacotherapy, electroconvulsive therapy, self-help techniques, and prevention through identification of risk factors and education.<sup>140</sup> Ideally, new mothers should be screened for the presence of risk factors during or before pregnancy through built-in checks that assess a woman's mental health and potential effects of the pregnancy.<sup>141</sup> Treatment with thyroid hormones, estrogen, progesterone, alone or in combination with antidepressant medication, has been studied in an attempt to prevent the recurrence of postpartum depression and psychosis.<sup>142</sup> However, effective treatment can only be ascertained when the true causes of postpartum mood disorders have been discerned.

## IV. THE "POSTPARTUM PSYCHOSIS" DEFENSE

*"The power of the mother . . . is to give or withhold survival itself."*<sup>143</sup>  
Adrienne Rich, twentieth-century writer

### A. *Initial Considerations: Special Defense Problems*

Unusual difficulties arise in the legal defense of infanticide. The juror or fact-finder most likely has a bias or a particular predisposition regarding motherhood, the nature of infanticide, and perhaps even the likely fate of the perpetrator.<sup>144</sup> Mothers who have committed infanticide while suffering from postpartum psychosis probably will have recovered

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140. See DUNNEWOLD, *supra* note 85, at 50; Scott P. Stuart, *Interpersonal Psychotherapy for Postpartum Depression*, in POSTPARTUM MOOD DISORDERS 143, 144-46 (Laura J. Miller ed., 1999) (detailing the effectiveness of pharmacotherapy and interpersonal psychotherapy in conjunction with counseling); see also O'Hara, *supra* note 96, at 23-25.

141. See DUNNEWOLD, *supra* note 85, at 79-81; Margaret G. Spinelli, *Prevention of Postpartum Mood Disorders*, in POSTPARTUM MOOD DISORDERS 217, 219 (Laura J. Miller ed., 1999).

142. O'Hara, *supra* note 96, at 23-25 (detailing various studies and methods used to treat postpartum depression); see DUNNEWOLD, *supra* note 85, at 70-71 (addressing various strategies used to address postpartum depression and psychosis).

143. PEARSON, *supra* note 61, at 64.

144. See MEYER ET AL., *supra* note 74, at 172 (observing women who commit infanticide receive wildly disparate sentences, depending on the predilections of local judges, juries, and prosecutors); Susan A. Hickman & Donald L. LeVine, *Postpartum Disorders and the Law*, in POSTPARTUM PSYCHIATRIC ILLNESS: A PICTURE PUZZLE 282, 283 (James Alexander Hamilton & Patricia Neel Harberger eds., 1992); Daniel Maier Katkin, *Postpartum Psychosis, Infanticide, and Criminal Justice*, in POSTPARTUM PSYCHIATRIC ILLNESS: A PICTURE PUZZLE 275, 275 (James Alexander Hamilton & Patricia Neel Harberger eds., 1992).

when the insanity defense is used at the time of trial, even without the aid of medication.<sup>145</sup> This ephemeral nature is particularly problematic in that it contradicts the stereotypical notion of a severe mental illness as a debilitating disorder that affects the defendant both during the commission of the act and at the time of trial, although this illness may be abated presently with the aid of medication. Aside from the difficulties in presenting the unique qualities of psychosis after childbirth—confusion and the mercurial nature of the disorder itself—the defense must also grapple with the fact that the terminology commonly used to designate postpartum mood disorders does not convey the degree and quality necessary to establish a credible position for the legal concept of insanity.<sup>146</sup>

Infanticide is not an isolated crime or a freak occurrence committed exclusively by women who are either insane or evil. The tasks performed by one parent, twenty-four hours a day, seven days a week, throughout the child's life are already difficult by themselves, but the situation is almost impossible for a mother incapacitated by a chronic mental impairment like postpartum psychosis. Under those circumstances, infanticide is not excusable, but also not far from unthinkable.

Mental illness or disability alone is not what leads to infanticide, but rather a combination of the mother's vulnerable mental health status and her social isolation.<sup>147</sup> In fact, against the backdrop of our stereotypical construction of motherhood, this condition may be all but inevitable.

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145. See MEYER ET AL., *supra* note 74, at 12; Hickman & LeVine, *supra* note 144, at 283; R. Kumar & Maureen Marks, *Infanticide and the Law in England and Wales*, in *POSTPARTUM PSYCHIATRIC ILLNESS: A PICTURE PUZZLE* 257, 257 (James Alexander Hamilton & Patricia Neel Harberger eds., 1992).

146. See Robert Lloyd Goldstein, *The Psychiatrist's Guide to Right and Wrong: Part III: Postpartum Depression and the "Appreciation" of Wrongfulness*, 17 BULL. AM. ACAD. PSYCHIATRY L. 121, 125-27 (1989); Hickman & LeVine, *supra* note 144, at 283-94; Kumar & Marks, *supra* note 145, at 257. The prosecution will most likely portray infanticide as an example of extreme child abuse. In order to rebut that argument, the defense must have ample positive evidence that the character and personality of the mother would make this theory implausible by attaining evidence from those who know her to be a "good mother." Hickman & LeVine, *supra* note 144, at 283-94; Kumar & Marks, *supra* note 145, at 257. Often compared to the mental state of a sleepwalker, details or even major events that occurred during psychosis are usually forgotten, and whatever is remembered is easily distorted or added to by subsequent discussion or interrogation. See Hickman & LeVine, *supra* note 144, at 283-94. The mercurial nature of postpartum psychosis is often apparent, particularly in the aftermath of the child's death. The effect of the shock may be a change in the pattern of psychotic thinking, coupled with terror, disorganization, and depression. See Kumar & Marks, *supra* note 145, at 257.

147. See MEYER ET AL., *supra* note 74, at 12 (observing that women suffering from postpartum psychiatric illness tend to stop speaking to others, isolate themselves, and become emotionally labile and severely sleep-deprived); Goldstein, *supra* note 146, at 124-26.



## B. *The Insanity Defense*

### 1. *A Historical Perspective*

As early as the sixth century, B.C., society has distinguished acts attributed to fault from those that occur without fault.<sup>148</sup> Acts for which fault could not be ascribed were thought to have been committed by children, who, regardless of their intent, were incapable of weighing the moral implications of personal behavior.<sup>149</sup> In this sense, mentally retarded and insane persons were likened to children because they were unable to differentiate between right and wrong so as to become invariably excepted from criminal responsibility.<sup>150</sup> Though criminal law mandates that one cannot be held criminally responsible unless each element of the offense charged can be established, the insanity defense can be viewed as a device that singles out an individual for commitment rather than an outright acquittal.<sup>151</sup> Society has long recognized that insane persons are relieved of criminal liability for their actions because they are incapable of understanding that their conduct violates a legal or moral standard.<sup>152</sup> The only traditional difference between the treatment of sane and insane individuals has been the fact that insane persons have been locked away in asylums rather than prisons.<sup>153</sup>

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148. See *Finger v. State*, 27 P.3d 66, 71 (Nev. 2001); Kimberly Waldron, Note, *Postpartum Psychosis as an Insanity Defense: Underneath a Controversial Defense Lies a Garden Variety Insanity Defense Complicated by Unique Circumstances for Recognizing Culpability in Causing*, 21 RUTGERS L.J. 669, 683 (1990) (discussing societal views of the insanity plea); see also RALPH SLOVENKO, *PSYCHIATRY AND CRIMINAL CULPABILITY* 6-7 (1995) (discussing the origins of the insanity plea).

149. See *Finger*, 27 P.3d at 71; SLOVENKO, *supra* note 148, at 7 (observing Blackstone wrote that "idiots and lunatics" are not chargeable for their own acts if they were incapacitated at the time they acted); Megan C. Hogan, Note, *Neonaticide and the Misuse of the Insanity Defense*, 6 WM. & MARY J. WOMEN & L. 259, 265 (1999) (noting that an individual must be able to distinguish right from wrong before he can be held accountable for his criminal actions).

150. See Jonas R. Rappeport, *The Insanity Plea Scapegoating the Mentally Ill—Much Ado About Nothing?*, 24 S. TEX. L.J. 687, 690 (1983); Hogan, *supra* note 149, at 265; Waldron, *supra* note 148, at 683-84. See generally Joseph E. diGenova & Victoria Toensing, *The Federal Insanity Defense: A Time for Change in the Post-Hinckley Era*, 24 S. TEX. L.J. 721, 722 (1983) (describing the Hadfield case in which the insanity defense was first created where the defendant's "delusional state" rather than his intent to commit the crime was critical to a determination of his guilt).

151. See *Finger*, 27 P.3d at 71; Tom Whatley, *Reshaping the Insanity Defense*, House Study Group: Special Legislative Report 13 (Texas House of Representatives 1984); 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* 429 (1986).

152. See *Finger*, 27 P.3d at 71; Rappeport, *supra* note 150, at 690; Waldron, *supra* note 148, at 683-84 (asserting society willingly excuses the act due to the defendant's lack of control and mental illness under the insanity defense).

153. See *Finger*, 27 P.3d at 71 (contending that although insane persons escaped criminal liability, they were still subject to confinement in an asylum rather than a prison); diGe-

Premised on concepts of free will and personal responsibility, our legal system recognizes that, when an individual is incapable of having the requisite criminal intent or *mens rea* at the time the act was performed, a just society cannot hold that person criminally liable.<sup>154</sup> Insanity is admissible only as related to a material element of the criminal offense so that a defendant is entitled to an acquittal only if the level of his mental illness completely negates a necessary element of the charged offense.<sup>155</sup> Thus, most legal communities have generally accepted the concept of legal insanity. However, the ultimate questions of what constitutes legal insanity and how it should be presented to a jury under the American legal system have yet to be resolved.

## 2. Theory and Application

In a majority of jurisdictions, including Texas, the *M'Naghten* rule<sup>156</sup> has long been accepted as the test to be applied when determining insanity.<sup>157</sup> Under *M'Naghten*, the defendant is not criminally responsible if he was laboring under such a defect of reason from disease of the mind at the time of committing the act as not to know the nature and quality of his act or, if he did know it, he did not know what he was doing was wrong.<sup>158</sup> The delusion must be so debilitating as to affect the defen-

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nova & Toensing, *supra* note 150, at 722 (noting Hadfield, the first defendant to assert the insanity defense, was imprisoned indefinitely in an asylum and died as a patient rather than a prisoner); Reece, *supra* note 110, at 754; see also Michelle Oberman, *Mothers Who Kill: Coming to Terms with Modern American Infanticide*, 32 AM. CRIM. L. REV. 1, 8 (1996).

154. See Rapoport, *supra* note 150, at 690; Rosenberg, *supra* note 111, at 287.

155. See Finger, 27 P.3d at 75; Reece, *supra* note 110, at 717-18.

156. See TEX. PENAL CODE ANN. § 8.01 (Vernon 2001); Daniel M'Naghten's Case, 8 Eng. Rep. 718, 718 (1843); Maria Massucci & James A. Pitaro, *Victimization as a Defense: Valid Protection for the Innocent or Escape from Criminal Responsibility?*, 8 ST. JOHN'S J. LEGAL COMMENT. 305, 327 (1992) (stating the *M'Naghten* test is the model most frequently incorporated into state penal statutes). Section 8.01, Insanity, states:

- (a) It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong.
- (b) The term "mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

TEX. PENAL CODE ANN. § 8.01 (Vernon 2001).

157. See *M'Naghten*, 8 Eng. Rep. at 718; LAFAVE & SCOTT, JR., *supra* note 151, at 436 (describing how the *M'Naghten* rule spearheaded the legal discourse regarding insanity); diGenova & Toensing, *supra* note 150, at 723. *M'Naghten* was not deemed to be legally insane under the *M'Naghten* test because, even if his delusion was true and the Prime Minister was conspiring to kill him, he was still not entitled to take the law into his own hands and hunt down the Prime Minister first. See LAFAVE & SCOTT, JR., *supra* note 151, at 436.

158. See LAFAVE & SCOTT, JR., *supra* note 151, at 436; Marcia Baran, Comment, *Postpartum Psychosis: A Psychiatric Illness, a Legal Defense to Murder or Both?*, 10 HAMLINE

dant's ability to appreciate his surroundings by either robbing him of the ability to understand what he is doing or depriving him of the ability to appreciate that his action is wrong or unauthorized by law.<sup>159</sup> Because delusional beliefs can only be grounds for legal insanity when the facts of the delusion, if true, would justify the commission of the criminal act, the nature of the defendant's delusional state is pivotal to his ability to understand right from wrong.<sup>160</sup>

Some jurisdictions have created a presumption of sanity that can be rebutted by the defense through introduction of evidence showing the defendant to be legally insane during the commission of the charged offense.<sup>161</sup> Once such evidence has been presented, the presumption of sanity is destroyed.<sup>162</sup> The burden then shifts to the prosecution to prove the defendant's sanity beyond a reasonable doubt as a necessary element of the crime charged.<sup>163</sup>

As a product more of political necessity than judicial reason,<sup>164</sup> the *M'Naghten* rule has long been the subject of controversy. Though created to provide a legal, as opposed to a medical, definition of insanity, the

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J. PUB. L. & POL'Y 121, 133-34 (1989). Two examples illustrate the two components of the *M'Naghten* test. See LAFAYE & SCOTT, JR., *supra* note 151, at 436. First, if A thought that he was shooting at a target shaped like a human being, he would meet the first factor of the *M'Naghten* test in that he does not comprehend the nature and quality of his act, specifically that he shot at a person instead of a target. See *id.* A would satisfy the second component of the *M'Naghten* test, that is, the defendant's inability to perceive his action as being wrong or illegal, if he thought he was a soldier in the middle of a battlefield and that the people he was killing were enemies. See *id.* In this scenario, even though A knows that he is killing human beings, he is unable to perceive it as wrong because of his delusional belief that he is in the middle of a war. See *id.*

159. See *Finger*, 27 P.3d at 72; Christine A. Fazio & Jennifer L. Comito, Note, *Rethinking the Tough Sentencing of Teenage Neonaticide Offenders in the United States*, 67 *FORDHAM L. REV.* 3109, 3151 (1999); see also SLOVENKO, *supra* note 148, at 119 (noting the hallucination or delusion must be relevant to the act committed, because an act by itself is not considered pathological merely due to the presence of pathology).

160. See *Finger*, 27 P.3d at 85; SLOVENKO, *supra* note 148, at 20-21; see also Beth E. Bookwalter, *Throwing the Bath Water Out with the Baby: Wrongful Exclusion of Expert Testimony on Neonaticide Syndrome*, 78 *B.U. L. REV.* 1185, 1197 (1998).

161. See *Finger*, 27 P.3d at 74; ROBERT F. SCHOPP, *JUSTIFICATION DEFENSES AND JUST CONVICTIONS* 24 (1998); Janet Ford, Note, *Susan Smith and Other Homicidal Mothers—In Search of the Punishment that Fits the Crime*, 3 *CARDOZO WOMEN'S L.J.* 521, 543-44 (1996).

162. See *Davis v. United States*, 160 U.S. 469, 473-74 (1895); *People v. Skeoch*, 96 N.E.2d 473, 475 (Ill. 1951); *Finger*, 27 P.3d at 74; SLOVENKO, *supra* note 148, at 34-35; see also SCHOPP, *supra* note 161, at 170-71.

163. See *Davis*, 160 U.S. at 473-74; *Skeoch*, 96 N.E.2d at 475; *Finger*, 27 P.3d at 74; SLOVENKO, *supra* note 148, at 34-35; see also SCHOPP, *supra* note 161, at 170-71.

164. See *White v. State*, 456 P.2d 797, 800-04 (Idaho 1969); Whatley, *supra* note 151, at 3; Rapoport, *supra* note 150, at 687-88. After *M'Naghten* was acquitted by reason of insanity, Queen Victoria asked the House of Lords to devise a clearer, more restrictive

*M'Naghten* test is based on what we now consider obsolete psychological principles.<sup>165</sup> Moreover, the *M'Naghten* rule only considers the cognitive aspects of personality by asking whether the defendant was able to recognize the difference between right and wrong.<sup>166</sup> Excluding the volitional aspect of behavior, particularly a defendant's capacity to make decisions and to conform to those decisions in controlling his conduct,<sup>167</sup> the *M'Naghten* test fails to recognize scientific degrees of mental illness by asking only if the defendant can distinguish between ethical concerns of what is right and wrong.<sup>168</sup> Admittedly, the *M'Naghten* test asks only whether the defendant had sufficient intellect at the time of the crime to know what generally accepted standards of morality are, instead of making value judgments on whether the defendant's behavior or theoretical standards conform to those generally accepted standards;<sup>169</sup> an individual who can distinguish right from wrong but is incapable of controlling or conforming his conduct to what is right due to an organic mental illness, such as postpartum psychosis, fails to meet the requirements of legal insanity under the *M'Naghten* test.<sup>170</sup>

Sometimes used in combination with the *M'Naghten* test, the "Irresistible Impulse" test<sup>171</sup> considers a defendant who has a mental disease that kept him from controlling his conduct as being legally insane, even if the

standard for establishing insanity, which resulted in the *M'Naghten* Rule. Whatley, *supra* note 151, at 3.

165. See White, 456 P.2d at 801 (describing a predecessor of *M'Naghten*, the "Wild Beast" test, which asks if the defendant had no more awareness of his actions than would a wild beast); LAFAYE & SCOTT, JR., *supra* note 151, at 446.

166. See White, 456 P.2d at 801; Nelson, *supra* note 112, at 638; see also SLOVENKO, *supra* note 148, at 19, 130.

167. See White, 456 P.2d at 801; SCHOPP, *supra* note 161, at 124; see also SLOVENKO, *supra* note 148, at 19, 130; Victoria Nourse, *The New Normativity: The Abuse Excuse and the Resurgence of Judgment in the Criminal Law*, 50 STAN. L. REV. 1435, 1446-47 (1998) (reviewing JAMES Q. WILSON, *MORAL JUDGMENT: DOES THE ABUSE EXCUSE THREATEN OUR LEGAL SYSTEM?* (1997)) (extending the theme of self-control to claims based on premenstrual syndrome, postpartum depression, and other versions of the insanity defense).

168. See White, 456 P.2d at 801-02; SLOVENKO, *supra* note 148, at 19; JAMES Q. WILSON, *MORAL JUDGMENT* 36-38 (1997); see also Nelson, *supra* note 112, at 637-39.

169. See LAFAYE & SCOTT, JR., *supra* note 151, at 446; SLOVENKO, *supra* note 148, at 20-21; Bookwalter, *supra* note 160, at 1198.

170. See White, 456 P.2d at 801-04; WILSON, *supra* note 168, at 36-37 (stating the *M'Naghten* rule does not take into consideration mental disturbances that are not delusional but nevertheless affect people's abilities to control their actions); see also Bookwalter, *supra* note 160, at 1198 (illustrating a case study where expert testimony was excluded, even though it demonstrated the defendant lacked the capacity to appreciate and know the consequences and nature of her conduct at the time of the criminal act).

171. See LAFAYE & SCOTT, JR., *supra* note 151, at 446; SLOVENKO, *supra* note 148, at 24-25 (noting an "irresistible impulse is an 'act [that] was not the act of a voluntary agent,

defendant knew what he was doing and that it was wrong at the time of the act.<sup>172</sup> Under the "Irresistible Impulse" test, the defendant must suffer from a mental condition which creates an overwhelming compulsion urging him to commit illegal acts.<sup>173</sup> An example of the distinction between the two tests can be seen in the aforementioned case study of Angela Thompson. Thompson, who drowned her infant son because she believed that God told her he would be resurrected as Jesus Christ, would be considered legally insane under the "Irresistible Impulse" test but sane under the *M'Naghten* test.<sup>174</sup> Under the "Irresistible Impulse" test, Thompson knew that she was killing her son and that she could not lawfully take his life; however, she could not resist what she perceived to be the will of God and, as such, acted under the impulse of her delusion.<sup>175</sup>

Founded upon the theory that insanity is established by a body of symptoms, rather than one diagnostic symptom which varies on a case-by-case basis,<sup>176</sup> the *Durham* test<sup>177</sup> was based on the premise that an individual was not responsible for an act that was the product of his mental disease or defect.<sup>178</sup> In order to be considered legally insane under the *Durham* or "Product" test, the defendant must not have committed a criminal act but for the existence of a mental disease or defect.<sup>179</sup> As the least restrictive test,<sup>180</sup> the *Durham* test is criticized as too

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but the involuntary act of the body, without the concurrence of a mind directing it"); Nelson, *supra* note 112, at 639-40.

172. See LAFAYE & SCOTT, JR., *supra* note 151, at 446; SLOVENKO, *supra* note 148, at 24-25; Waldron, *supra* note 148, at 688.

173. See *Finger v. State*, 27 P.3d 66, 73 (Nev. 2001); SLOVENKO, *supra* note 148, at 24-25; Waldron, *supra* note 148, at 688 n.128.

174. See *Finger*, 27 P.3d at 73; SLOVENKO, *supra* note 148, at 24-25 (applying the "Irresistible Impulse" test only to a sudden and transitory condition akin to momentary past insanity); see also Nelson, *supra* note 112, at 639-40.

175. See *Finger*, 27 P.3d at 73; Christine Anne Gardner, *Postpartum Depression Defense: Are Mothers Getting Away with Murder?*, 24 NEW ENG. L. REV. 953, 973-76 (1990) (arguing that any evidence showing a mother suffering from postpartum psychiatric illness to know she was killing her child or to know it to be a criminal act would render her sane under the *M'Naghten* test).

176. See LAFAYE & SCOTT, JR., *supra* note 151, at 455; Nelson, *supra* note 112, at 640-41 (recognizing the field of psychiatry considered the right-wrong test under *M'Naghten* as an inadequate guide to mental responsibility due to its narrow focus on knowledge or reason alone).

177. See *Durham v. United States*, 214 F.2d 862, 863 (D.C. Cir. 1954); *Finger*, 27 P.3d at 73; LAFAYE & SCOTT, JR., *supra* note 151, at 455.

178. See *Durham*, 214 F.2d at 876; *Finger*, 27 P.3d at 73; LAFAYE & SCOTT, JR., *supra* note 151, at 455.

179. See *Durham*, 214 F.2d at 863; *Finger*, 27 P.3d at 73; see also LAFAYE & SCOTT, JR., *supra* note 151, at 457. Postpartum psychosis is obviously a mental disease or defect, marked by paranoia or delusion, under even the rudimentary definition of the *Durham*

expansive and ambiguous, tending to cause the law to abdicate its policy functions in deference to purely medical considerations.<sup>181</sup>

Adopted in approximately half of the states and all federal circuits, the American Law Institute (A.L.I.) Model Penal Code test<sup>182</sup> integrated elements of *M'Naghten*, "Irresistible Impulse," and *Durham* into a two-part test.<sup>183</sup> In order to be held legally insane, the defendant must lack substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law at the time of the conduct as a result of mental disease or defect.<sup>184</sup> However, an abnormality manifested by repeated criminal or anti-social conduct does not constitute a "mental disease or defect" under the A.L.I. Model Penal Code test.<sup>185</sup> In order to be considered legally insane, the defendant must have a substantial impairment of his mental capacity, as opposed to merely possessing *some* impairment as required by the *Durham* test or to the degree of total incapacity as recognized by the *M'Naghten* rule.<sup>186</sup> Under the A.L.I. Model Penal Code test, a defendant who appreciates the wrongfulness of his act is still not criminally responsible if he cannot conform to the requirements of law due to an incapacity caused by a mental disease or defect, paralleling the "Irrational Impulse" test.<sup>187</sup>

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test. Nelson, *supra* note 112, at 641 (noting the *Durham* test broadly defined "defect" as a deteriorating condition incapable of improving).

180. See Finger, 27 P.3d at 74; Brenda Barton, *When Murdering Hands Rock the Cradle: An Overview of America's Incoherent Treatment of Infanticidal Mothers*, 51 SMU L. REV. 591, 598-99 (1998).

181. See *White v State*, 456 P.2d 797, 803 (Idaho 1969); see also LAFAYE & SCOTT, JR., *supra* note 151, at 461.

182. See LAFAYE & SCOTT, JR., *supra* note 151, at 462-63; Barton, *supra* note 180, at 599 (noting that the test is codified in the Model Penal Code § 4.01).

183. See Finger, 27 P.3d at 74; Hogan, *supra* note 149, at 268-69.

184. See Finger, 27 P.3d at 73; LAFAYE & SCOTT, JR., *supra* note 151, at 462-63; Hogan, *supra* note 149, at 268-69.

185. See Finger, 27 P.3d at 74; LAFAYE & SCOTT, JR., *supra* note 151, at 463.

186. See Finger, 27 P.3d at 74; Nelson, *supra* note 112, at 643 (noting only those actually suffering from postpartum psychiatric disorders will be acquitted under the A.L.I.'s test, and those acquitted will be institutionalized since automatic commitment to a mental hospital is mandated by the Model Penal Code); see also Hogan, *supra* note 149, at 268-71 (discussing the *M'Naghten* and A.L.I. tests and their differences).

187. See *White v State*, 456 P.2d 797, 803 (Idaho 1969) (noting that the A.L.I. test considers both volitional and cognitive impairments); Whatley, *supra* note 151, at 6; Nelson, *supra* note 112, at 643. Under the A.L.I. Model Penal Code test, a mother suffering from postpartum psychiatric illness may successfully negate one of the necessary elements by arguing that her psychosis rendered her incapable of appreciating the wrongfulness of her act or prevented her from controlling her act. See Nelson, *supra* note 112, at 643.

Viewed more in the context of strict liability, the *Mens Rea* Model<sup>188</sup> includes only the first part of the *M'Naghten* rule, eliminating the concept of appreciation for the wrongfulness of an act.<sup>189</sup> Defining criminal intent simply as a decision to perform an act, the *Mens Rea* Model holds defendants criminally responsible as long as they had the intent to commit a particular act, even if the definition of the crime requires a more specific mental state.<sup>190</sup> As long as the defendant can appreciate the nature and quality of his act, he is not legally insane and thus capable of forming the requisite *mens rea*.<sup>191</sup> Altering the focus of criminal intent without actually changing the elements of the crimes themselves, the *Mens Rea* Model assumes that all crimes require the simple intent to do an act and ignores the fact that most crimes have a required element beyond the mere performance of an act.<sup>192</sup>

Since even the most psychotic defendant may arguably know what he is doing is wrong, the mere fact that postpartum psychosis satisfies the medical definition of a mental illness does not exonerate a defendant suffering from such a condition under the legal standards of insanity. The test of insanity turns instead on the interpretation of whether the defendant understood the nature and quality of his actions during the commission of the act.<sup>193</sup> A defendant suffering from postpartum psychosis may know that killing her child was wrong but may not appreciate the wrongfulness of such an act at the time, due to the debilitating effects of her mental illness and the unique circumstances that may outweigh rational thinking after childbirth.<sup>194</sup> Under the *M'Naghten* test, postpartum psychosis satisfies the criteria of a mental disease or defect by preventing the defendant from understanding the nature and quality of her act or knowing that her act was wrong.<sup>195</sup> The same defendant, according to the "Irresis-

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188. See *Finger*, 27 P.3d at 74; Peter Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827, 828-29 (1977).

189. See *Finger*, 27 P.3d at 75; Arenella, *supra* note 188, at 828-29.

190. See *Finger*, 27 P.3d at 75 (noting that an additional specific mental state, such as malice, required by statutory definitions of the crimes charged may be overlooked).

191. See *id.*; see also Arenella, *supra* note 188, at 828-29.

192. See *Finger*, 27 P.3d at 75; Arenella, *supra* note 188, at 828-29.

193. See MEYER ET AL., *supra* note 74, at 71; Baran, *supra* note 158, at 133-34.

194. See SCHWARTZ & ISSER, *supra* note 63, at 108-09; Brusca, *supra* note 110, at 1150-51.

195. See Brusca, *supra* note 110, at 1152-53; Button, *supra* note 110, at 337-38 (noting some experts assert postpartum psychosis meets the criteria of the *M'Naghten* test); Lentz, *supra* note 64, at 540 (noting that, as a medically defined psychosis, postpartum psychosis is a disease or defect of the mind and its manifestations can be analogized to other psychotic disorders that are widely accepted as insanity defenses such as schizophrenia); see also Michael J. Davidson, *Feminine Hormonal Defenses: Premenstrual Syndrome and Postpartum Psychosis*, 2000 ARMY LAW. 5, 14 n.125 (2000).

tible Impulse" test, is acting at the direction of her delusions rather than her free will when her child was killed.<sup>196</sup> Alternatively, the defendant's conduct may be a "product" of her mental disease or defect under the *Durham* test, since having the child is at least the partial cause of postpartum psychosis.<sup>197</sup> Since the Model Penal Code does not define "mental disease," medical evidence can be fully disclosed to the jury to determine whether the defendant experienced sufficient cognitive dysfunction which caused her to lack substantial capacity to appreciate the criminality of her conduct or to conform her conduct to legal requirements under the A.L.I. Model Penal Code test.<sup>198</sup>

### 3. Texas Law and the Impetus for Change

The insanity defense is seldomly used and even less often successful in Texas.<sup>199</sup> In fact, defendants who employ the insanity defense tend to spend more time in mental hospitals than they would spend in prison had they relied on another defense.<sup>200</sup> Though Texas traditionally used the A.L.I. Model Penal Code test with some modifications,<sup>201</sup> the Texas legislature enacted a more restrictive definition of insanity in 1983, eliminating the uncontrollable-conduct test to return to the *M'Naghten* test and restricting use of the insanity defense only to cases of severe mental illness.<sup>202</sup> Requiring continuing criminal court jurisdiction over defendants acquitted of violent crimes by reason of insanity as a form of post-acquittal supervision, Texas formed a two-track system of jurisdiction, dividing defendants accused of violent crimes and defendants of non-violent

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196. See Button, *supra* note 110, at 338; Lentz, *supra* note 64, at 540; see also Deborah W. Denno, *Gender, Crime, and the Criminal Law Defenses*, 85 J. CRIM. L. & CRIMINOLOGY 80, 122 n.193 (1994).

197. See SLOVENKO, *supra* note 148, at 24-25; Brusca, *supra* note 110, at 1153-54; Button, *supra* note 110, at 338; Lentz, *supra* note 64, at 541; see also Deborah W. Denno, *Human Biology and Criminal Responsibility: Free Will or Free Ride?*, 137 U. PA. L. REV. 121-23, 615 (1988).

198. See Brusca, *supra* note 110, at 1154-55; Button, *supra* note 110, at 338-39; John Dent, *Postpartum Psychosis and the Insanity Defense*, 1989 U. CHI. LEGAL F. 355, 363 (1989); Lentz, *supra* note 64, at 541.

199. See Whatley, *supra* note 151, at 10-11; diGenova & Toensing, *supra* note 150, at 721.

200. See Whatley, *supra* note 151, at 11; MICHAEL L. PERLIN, *THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL* 229 (2000); see also Rachel Anne Dwares, Note, *Due Process Concerns with Delayed Psychiatric Evaluations and the Insanity Defense: Time Is of the Essence*, 64 B.U. L. REV. 861, 865 (1984).

201. See Whatley, *supra* note 151, at 5 (noting the Texas legislature modified "right from wrong" provisions to correspond with the stricter requirements of the *M'Naghten* Rule and placed the burden of proving insanity on defendants).

202. See *id.* at 12.



crimes.<sup>203</sup> As part of the criminal courts' continuing jurisdiction over defendants acquitted by reason of insanity for violent crimes, defendants who are involuntarily committed can be discharged after a hearing in the court that ordered the commitment.<sup>204</sup> This jurisdiction continues until the defendant has been institutionalized for a period equivalent to the maximum prison sentence of the crime charged.<sup>205</sup>

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203. See *id.* at 13-17 (explaining that disparate treatment of defendants acquitted by reason of insanity are justified because the defendants acquitted of violent crimes, though found not guilty by jurors, essentially committed what would otherwise be criminal acts); Ray Farabee & James L. Spearly, *The New Insanity Law in Texas: Reliable Testimony and Judicial Review of Release*, 24 S. TEX. L.J. 671, 681-84 (1983).

204. See Whatley, *supra* note 151, at 14. Defendants acquitted of violent crimes on grounds of insanity are automatically committed to a maximum-security unit for 60 days to examine their mental condition post-acquittal. See TEX. CODE CRIM. PROC. ANN. art. 46.03(4)(b) (Vernon 2001); Whatley, *supra* note 151, at 13; Farabee & Spearly, *supra* note 203, at 681. Within thirty days of acquittal, the criminal trial court must hold a hearing to determine whether the defendant should be involuntarily committed to a state hospital or mental institute for a period not to exceed ninety days according to the Texas Mental Health Code and Texas Criminal Procedure. See TEX. CODE CRIM. PROC. ANN. art. 46.03(4)(d)(2) (Vernon 2001). Similar to the standards employed in a civil commitment hearing, the State bears the burden to prove by clear and convincing evidence that the defendant meets the criteria for involuntary commitment or should be committed longer. See *id.*; *Addington v. Texas*, 441 U.S. 418 (1979); Whatley, *supra* note 151, at 17; diGenova & Toensing, *supra* note 150, at 731; Farabee & Spearly, *supra* note 203, at 681; Rappeport, *supra* note 150, at 693.

205. See Whatley, *supra* note 151, at 14 (noting that any further confinement must be by civil commitment after the continuing criminal court jurisdiction has expired). However, other states go even further in their disparate treatment of defendants acquitted on grounds of insanity. For example, in other states, evidence of insanity "at the time of a crime justifies a presumption that the defendant is not only still mentally ill but also dangerous regardless of whether violence was involved in the commission of the crime." *Id.* at 16. Thus, defendants acquitted on insanity grounds may be required to prove their current sanity by clear and convincing evidence in order to win release from indefinite commitment. *Jones v. United States*, 463 U.S. 354, 366-68 (1983); Whatley, *supra* note 151, at 17. Even though Due Process requires that the nature and duration of confinement bear some reasonable relationship to the purpose for which the defendant is committed, indefinite commitment based on an insanity acquittal alone is still possible. See *Jones*, 463 U.S. at 368. Because correlation between the severity of the offense and the length of time necessary for the acquittee's recovery is not required, the duration of the acquittee's theoretical criminal sentence is thus irrelevant for purposes of his commitment. See Whatley, *supra* note 151, at 17; Farabee & Spearly, *supra* note 203, at 684-85; Rappeport, *supra* note 150, at 694-95.

Texas Penal Code section 8.01 states that insanity<sup>206</sup> is an affirmative defense<sup>207</sup> when the actor did not know his conduct was wrong during the commission of the charged offense due to a severe mental disease or defect.<sup>208</sup> The insanity defense is the only occasion whereby the defense must furnish a reason or motive for a criminal act even though the reason

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206. The concept of insanity is not to be confused with competency to stand trial. Competency refers to the defendant having the ability to consult with his attorney with a reasonable degree of rational understanding and having a rational and factual understanding of the proceedings against him. See GERALD S. REAMEY, CRIMINAL OFFENSES AND DEFENSES IN TEXAS 243 (2000). A defendant can be incompetent to stand trial but adjudged legally sane at the time of the crime or vice versa. *Id.*

207. See *id.* at 128 (noting that a defendant must persuade the fact-finder that he is entitled to the affirmative defense by a preponderance of the evidence). Under *In re Winship*, 397 U.S. 358 (1970), the State must prove the defendant's guilt and every element essential to the charged offense beyond a reasonable doubt. REAMEY, *supra* note 206, at 243. After *Mullaney*, it was suggested that affirmative defenses like duress and insanity improperly shifted the burden of persuasion on the defendant to disprove the existence of an essential element of the offense. *Id.* *Patterson* denoted that the State may shift the burden of persuasion with respect to certain defensive matters as long as the effect is not to ease the State's burden of proof on what is defined as an element of the crime in the specific statute. *Id.* at 129.

208. See TEX. PENAL CODE ANN. § 6.01 (Vernon 2001) (denoting that criminal responsibility generally requires a voluntary act or omission); TEX. PENAL CODE ANN. § 6.02 (Vernon 2001); TEX. PENAL CODE ANN. § 6.03 (Vernon 2001); TEX. PENAL CODE ANN. § 8.01 (Vernon 2001) (excepting that mental disease or defect does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct); see also REAMEY, *supra* note 206, at 118. Unless the offense is specifically designated as a strict liability crime, every offense requires at least one of four levels of culpability established by the Texas Penal Code. REAMEY, *supra* note 206, at 118. These four levels of culpability, intentional, knowing, reckless, and criminally negligent, from highest to lowest order, are each divided into the nature and result of an actor's conduct. *Id.* at 119. Often inferred from circumstantial evidence, an intentional act is the product of a conscious desire or objective to either engage in the conduct or cause the result. *Id.* A knowing act is one where the actor is aware of the nature of the conduct, existence of certain circumstances, or reasonable certainty by which his actions are to cause a result. *Id.* at 120. In contrast, an actor is reckless if he ignored a substantial and unjustifiable risk that he subjectively knew to have existed. *Id.* Similarly, even though an actor may have been unaware of a substantial and unjustifiable risk, he is still criminally negligent if he *should* have objectively known of that risk. *Id.* Section 6.01, Requirement of Voluntary Act or Omission, states:

- (a) A person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession.
- (b) Possession is a voluntary act if the possessor knowingly obtains or receives the thing possessed or is aware of his control of the thing for a sufficient time to permit him to terminate his control.
- (c) A person who omits to perform an act does not commit an offense unless a law as defined by Section 1.07 provides that the omission is an offense or otherwise provides that he has a duty to perform the act.

TEX. PENAL CODE ANN. § 6.01 (Vernon 2001). Section 6.02, Requirement of Culpability, denotes:

itself does not necessarily provide a defense against criminal responsibility for the medically insane.<sup>209</sup> The defendant must raise a reasonable

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- (a) Except as provided in Subsection (b), a person does not commit an offense unless he intentionally, knowingly, recklessly, or with criminal negligence engages in conduct as the definition of the offense requires.
  - (b) If the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element.
  - (c) If the definition of an offense does not prescribe a culpable mental state, but one is nevertheless required under Subsection (b), intent, knowledge, or recklessness suffices to establish criminal responsibility.
  - (d) Culpable mental states are classified according to relative degrees, from highest to lowest, as follows:
    - (1) intentional;
    - (2) knowing;
    - (3) reckless;
    - (4) criminal negligence.
  - (e) Proof of a higher degree of culpability than that charged constitutes proof of the culpability charged.

TEX. PENAL CODE ANN. § 6.02 (Vernon 2001). Section 6.03, Definition of Culpable Mental States, observes:

- (a) A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.
- (b) A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.
- (c) A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.
- (d) A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

TEX. PENAL CODE ANN. § 6.03 (Vernon 2001).

209. See REAMEY, *supra* note 206, at 244 (recognizing that insanity is not established as a matter of law even if the only witness expressing an opinion on the defendant's sanity is an expert who concludes that he was insane because the fact-finder can choose not to believe expert witnesses); diGenova & Toensing, *supra* note 150, at 731 (noting that motive is not a relevant defense consideration in all other circumstances, so insanity can be portrayed as an "Excuse" defense).

doubt about his ability to form the requisite *mens rea* of the charged offense since a mental disease or defect alone does not otherwise constitute a defense.<sup>210</sup> Because Texas does not have a presumption of sanity, the defendant bears the burden of proving insanity by a preponderance of the evidence.<sup>211</sup>

In addition to proving that he did not appreciate the wrongfulness of his act in order to prevail, the defendant must also demonstrate that his mental incapacity existed at the time of the conduct and his lack of cognition was the result of a *severe* mental disease or defect.<sup>212</sup> Nevertheless, the growing public sentiments that "justice is not being done" or that "people are getting away with murder"<sup>213</sup> are now giving rise to a more punitive attitude, particularly regarding use of an insanity plea. The insanity defense curbs this need to punish offenders and exact retribution.<sup>214</sup>

### C. The "Excuse" Defense

#### 1. Diminished Capacity (Partial Responsibility)

The concept of diminished capacity or partial responsibility is overbroad, including not only mental diseases and defects but also any condi-

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210. See REAMEY, *supra* note 206, at 242 (contending, as a fundamental principle of criminal justice, an individual can be held criminally responsible for his conduct only when he acts with a guilty mind or some level of culpability so as to have acted voluntarily); diGenova & Toensing, *supra* note 150, at 731.

211. See Whatley, *supra* note 151, at 7 (noting that, if the defendant successfully proves insanity by a preponderance of the evidence, then the burden shifts to the State to prove beyond a reasonable doubt that the defendant was sane enough to possess the requisite mental state for the offense charged, in addition to proving beyond a reasonable doubt that the defendant had the specific type of criminal intent required for the crime charged); REAMEY, *supra* note 206, at 243 (stating the defendant bears the burden of production to raise the issue of insanity and the burden of persuasion to convince the fact-finder that a preponderance of the evidence supports his defense); see also Clark v. State, 588 P.2d 1027, 1030 (Nev. 1979).

212. See REAMEY, *supra* note 206, at 244 (postulating that timing of a defendant's incapacity is critical, as well as the severity of his mental disease or defect, so that only the most obviously deranged defendants are entitled to the insanity defense); Dent, *supra* note 198, at 356.

213. See diGenova & Toensing, *supra* note 150, at 734 (quoting W. Gaylin, *Legal Insanity: Gone Bonkers*, WASH. POST, June 20, 1982, at C1); Farabee & Searly, *supra* note 203, at 676 (commenting that the author, Senator Farabee, was "confused and outraged by a legal system that could excuse from responsibility a person who committed an act of violence in what appeared to be a conscious and premeditated manner"); Rappeport, *supra* note 150, at 693.

214. See Rappeport, *supra* note 150, at 689 (asserting that changing the insanity defense will do nothing to eliminate crime, and that if insane persons are tried and convicted it will be done in the name of public concern about violent crime).

tion that prevents formations of the requisite *mens rea* (i.e., intoxication).<sup>215</sup> Unlike the insanity defense, diminished capacity reduces the level of criminal responsibility rather than excluding criminal responsibility altogether.<sup>216</sup> Theoretically, a defendant suffering from an abnormal mental condition insufficient to warrant an insanity defense at the time of the conduct is ineligible for a finding of "not guilty by reason of insanity."<sup>217</sup> Nevertheless, his mental abnormality is still a relevant factor in the determination of his guilt.<sup>218</sup> Thus, evidence about the defendant's mental condition is admissible on the question of whether he possessed the requisite mental state as an element of the charged offense.<sup>219</sup> Though the defendant may not be guilty of the charged offense, he can still be convicted of lesser offenses that result in imprisonment rather than a commitment in a mental institution from a successful insanity defense.<sup>220</sup>

Opponents of the diminished capacity theory question the trustworthiness of psychiatric testimony on the issue of *mens rea*, noting that the fact-finder becomes dependant upon evidence of limited reliability.<sup>221</sup> Yet this problem can be resolved if the trial judge initially determines whether such evidence has sufficient scientific support to warrant its use and would help the jury determine key issues.<sup>222</sup> In cases of infanticide, the concept of diminished capacity avoids a claim of insanity and potentially reduces charges of murder to manslaughter, resulting in rehabilitative confinement rather than penal incarceration.<sup>223</sup> This result most closely fits the rubric of therapeutic jurisprudence by making a legal judg-

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215. See *White v State*, 456 P.2d 797, 803 (Idaho 1969).

216. See *id.*

217. See LAFAYE & SCOTT, JR., *supra* note 151, at 522.

218. See *id.*

219. See *id.* at 530-31 (noting that otherwise, such offenses charged would effectively become strict liability offenses when applied to abnormal defendants); see also diGenova & Toensing, *supra* note 150, at 731-32 (establishing that motive is not usually a relevant consideration in murder).

220. See LAFAYE & SCOTT, JR., *supra* note 151, at 523; Barton, *supra* note 180, at 601; see also Baran, *supra* note 158, at 135-36.

221. See LAFAYE & SCOTT, JR., *supra* note 151, at 531; Baran, *supra* note 158, at 135.

222. See LAFAYE & SCOTT, JR., *supra* note 151, at 531; Ford, *supra* note 161, at 532 (observing that psychiatric testimony regarding defendant's *mens rea* resolves key issues by explaining or excusing the defendant's behavior, the reasonableness of which is to be determined from the viewpoint of the actor and under circumstances as he had believed them to have been); see also Arenella, *supra* note 188, at 829-30 (describing the formal mitigation model which opens the courtroom doors to most expert psychological testimony).

223. See SCHWARTZ & ISSER, *supra* note 63, at 109 (recognizing the guilty but mentally ill verdict as the medium option between guilt and total innocence of the crime where the evidence in question is insufficient to satisfy any of the standard insanity tests); Barton, *supra* note 180, at 601; Ford, *supra* note 161, at 533.

ment with an awareness of mental health implications, sentencing difficulties, and the offenders' rehabilitation needs.<sup>224</sup>

## 2. Automatism

Likewise, the automatism defense is similar to the non-volitional aspect underlying the doctrine of diminished capacity. Noting that a defendant who engaged in otherwise criminal conduct is not guilty of a crime if he did so in a state of unconsciousness or semi-consciousness, the theory of automatism implies a disturbance of the consciousness which compels the individual to take involuntary action.<sup>225</sup> The underlying rationale is not so much that the defendant lacks the necessary mental state for commission of the charged offense, but that the defendant has not engaged in a voluntary act.<sup>226</sup> Raised as a defense in cases involving epilepsy, hypnosis, concussion, emotional trauma, or Premenstrual Syndrome,<sup>227</sup> automatism is a distinct entity which has often been mistakenly labeled as another facet of the insanity defense.<sup>228</sup> Automatism may be present even if the defendant lacks a mental disease or defect, a key element of

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224. See SCHWARTZ & ISSER, *supra* note 63, at 109; Barton, *supra* note 180, at 601. The concept of diminished capacity can be paralleled to Extreme Mental and Emotional Disorder found in the Model Penal Code § 210.3(b). SCHWARTZ & ISSER, *supra* note 63, at 108. As a legal construct, rather than a psychiatric or psychological approach, an extreme mental and emotional disorder is usually based on long-standing, internal stresses that lead a homicidal mother to some "reasonable excuse for the emotional disturbance" and subsequent homicide, resulting in a reduced charge or penalty as a partial defense. *Id.*

225. See LAFAYE & SCOTT, JR., *supra* note 151, at 541-43. One who is not conscious or aware of what he is doing is not criminally responsible for killing a person in a clouded state somewhere between wakefulness and sleep. *See id.* For example, this state of unconsciousness can be demonstrated in "blacking out" without warning when driving and hitting a pedestrian without previous notice as to warrant criminal negligence. *People v. From*, 108 Cal. App. 3d 820 (1980); *Polston v. State*, 685 P.2d 1 (Wyo. 1981); *Fulcher v. State*, 633 P.2d 142 (Wyo. 1981); LAFAYE & SCOTT, JR., *supra* note 151, at 542-43.

226. *See* LAFAYE & SCOTT, JR., *supra* note 151, at 542-44 (noting that a defendant is not guilty of a crime because he has not engaged in an "act," and without an act there can be no crime).

227. *See id.* at 543 (declaring the Premenstrual Syndrome is a physiological disorder that may fit more closely within the automatism defense since it is not a disease or defect of the mind, even though Premenstrual Syndrome can render a woman unable to control her actions for a short period); Button, *supra* note 110, at 340. However, there is little case law on the subject of the automatism defense, which excludes sudden memory relapse from amnesia, multiple personality disorders, or brainwashing. LAFAYE & SCOTT, JR., *supra* note 151, at 544.

228. *See* LAFAYE & SCOTT, JR., *supra* note 151, at 544; Button, *supra* note 110, at 330-31.

the insanity defense, and may result in an outright acquittal rather than commitment.<sup>229</sup>

Opponents of the automatism defense contend that automatism broadens the definition of a "disease of the mind" to essentially expand the insanity defense. Yet a defendant who has acted unconsciously due to a physical or organic disorder should not be limited solely to a defense that can result in commitment intended for the mentally ill. Advocates of the automatism defense propose that a defendant who is acquitted due to an automatism defense can alternatively be released upon receipt of medical treatment necessary to prevent repetitious behavior in the future.<sup>230</sup>

## V. GENDER AND CRIMINAL LAW

*"A woman in prison is not a dangerous man."*<sup>231</sup>

Headline, *The New York Times Magazine*, July 3, 1996

### A. Punishment

#### 1. Influence of Gender Stereotype

The word "mother" invokes a symbol of warmth and nurture, an embodiment of nature's ultimate caregiver. Throughout history and myth, women have been perceived either as Eve, the wanton temptress, or as the "mother," virginal and pure.<sup>232</sup> Because the universal culture views a mother as self-sacrificing, compassionate, caring, and loving, we often confuse the notion of a "good mother" with that of a "good woman."<sup>233</sup> Mothers who killed their children, having committed such an "unnatural act," were thus considered mad or evil.<sup>234</sup> Likewise, some may consider such a mother as having violated her cultural image as a life-giver, and therefore seek to punish her more severely than a man for breaking the hedonic bond between mother and child.<sup>235</sup>

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229. See LAFAYE & SCOTT, JR., *supra* note 151, at 544-46 (noting that a defendant only has to produce evidence raising doubt as to his consciousness at the time of the alleged crime); Button, *supra* note 110, at 330.

230. See LAFAYE & SCOTT, JR., *supra* note 151, at 549.

231. PEARSON, *supra* note 61, at 201.

232. See SCHWARTZ & ISSER, *supra* note 63, at 3; Ford, *supra* note 161, at 534.

233. See SCHWARTZ & ISSER, *supra* note 63, at 3; Denno, *supra* note 196, at 160.

234. See MEYER ET AL., *supra* note 74, at 69-70 (mentioning that women who kill their children are regarded as having committed the ultimate sin in most societies, including our own); SCHWARTZ & ISSER, *supra* note 63, at 3 (theorizing that a woman's problems were traditionally thought to have been caused by gender and biology which, as indicators of her inherent vulnerability and inferiority from the male sex, required her to seek protection from the world outside of the domestic sphere).

235. See SCHWARTZ & ISSER, *supra* note 63, at 81.

Under our criminal justice system, women were often judged not simply on the basis of their legal infractions, but also for their compliance or variance from stereotypical female behavior.<sup>236</sup> This prejudice was especially true in cases of neonaticide and infanticide because these crimes contradicted the very concepts of motherhood and femininity. Such stereotypes affect the ways in which we characterize and punish women.

As a fundamental percept of our criminal law, a person is only punishable for a crime if he can be held morally responsible.<sup>237</sup> A woman who commits infanticide while suffering from postpartum psychosis cannot be held morally culpable if she fell victim to something which she could not control, so punishment under such circumstances would be inappropriate.<sup>238</sup> Theoretically, punishment functions to achieve prevention, restraint, rehabilitation, and deterrence.<sup>239</sup> What do we seek to gain by punishing a woman who has killed her child while suffering from postpartum psychosis?

Prevention and deterrence seek to subject individuals to an unpleasant experience so that they will be less likely to commit other crimes in the future,<sup>240</sup> but this objective will only be effective if individuals receiving punishment are actually able to *prevent* themselves from committing future offenses. Mothers suffering from a mental illness, such as postpartum psychosis, over which they exercise no control, are unlikely to achieve prevention or deterrence without receiving the treatment necessary to avoid repetitive behavior or symptoms.

In terms of rehabilitation, the mental health services needed are more accessible outside of prison and can be required as a condition of probation.<sup>241</sup> Retribution is predicated on society's right to punish one who is to blame for the unjustified taking of life,<sup>242</sup> but can we allocate blame to

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236. See *id.* at 3 (observing that women who failed to conform to assumed gender characteristics were perceived as "bad"); Denno, *supra* note 196, at 160.

237. See SLOVENKO, *supra* note 148, at 6-7; Brusca, *supra* note 110, at 1149-51; see also SCHWARTZ & ISSER, *supra* note 63, at 103.

238. See SCHWARTZ & ISSER, *supra* note 63, at 103.

239. See LAFAYE & SCOTT, JR., *supra* note 151, at 431.

240. See *id.*; MEYER ET AL., *supra* note 74, at 174; SCHWARTZ & ISSER, *supra* note 63, at 74 (distinguishing infanticide undoubtedly is a crime even in its most basic definition, but there is little or no evidence to support imprisonment as an effective deterrent).

241. See MEYER ET AL., *supra* note 74, at 175-76 (expounding that the British system requires women who commit infanticide to receive counseling in order to be eligible for probation); SCHWARTZ & ISSER, *supra* note 63, at 111-16 (suggesting that proposed alternatives include sentencing in combination with mandatory psychotherapy or counseling, even tying in community service with probation as an option to educate other young mothers or teenagers).

242. See LAFAYE & SCOTT, JR., *supra* note 151, at 431; MEYER ET AL., *supra* note 74, at 175.



a single individual under such circumstances? Infanticides committed by mothers while suffering from postpartum psychosis are tragically preventable and cannot be attributed to one person alone.<sup>243</sup> Killings induced by postpartum psychosis are caused by a mental and physical illness beyond the mother's control, a result for which the mother alone is ultimately held both legally and personally accountable.<sup>244</sup>

Historically, laws were passed in order to affect moral and social behavior by punishing single women for becoming pregnant and for refusing to live with their sins by committing infanticide. For example, during the late medieval period, the Roman Catholic Church ascribed heavy punishments for infanticide, but such laws were addressed only to women.<sup>245</sup> From simple beheadings or burnings to live burials,<sup>246</sup> women were singled out as the sole responsible party to bear the stigma and punishment of infanticide.

Today, some may argue that fathers as opposed to mothers are generally punished more severely because gender stereotypes and cultural images of women are more apt to affect public sympathy.<sup>247</sup> However, in practice, no equal responsibility is applied, as males simply disappear into the landscape, escaping social opprobrium and responsibility as well as any general notice or attention.<sup>248</sup> Upon further examination, we must question whether penalties of the past are at all different from our treatment of mothers who kill their children today.

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243. See Attia et al., *supra* note 85, at 113 (commenting on the failure of a mother's social network to provide her with adequate support).

244. See EWING, *supra* note 51, at 65. Research conducted by Dr. Daniel Katkin of the University of Pennsylvania revealed that approximately half of those who used a postpartum depression defense were found guilty of infanticide. See *id.* He claimed these statistics supported the notion that women were ultimately deemed to be legally responsible for such reprehensible acts. *Id.*

245. See SCHWARTZ & ISSER, *supra* note 63, at 35-36 (noting that such rules created by the Roman Catholic Church never applied to men or even *both* parents).

246. See *id.* The Holy Roman Empire called for live burial, drowning, or impaling, but such practice was replaced in the seventeenth century by torture and decapitation. Likewise, mothers found guilty of infanticide were burned or buried alive after intense torture in late medieval France. *Id.*

247. See *id.* at 89.

248. See *id.* at 87-89 (detailing how the father is more often nowhere to be found or gets a slap on the wrist, particularly in cases involving neonaticide, whereas the woman is sent to prison); Denno, *supra* note 196, at 160 (listing factors which render the postpartum psychosis defense unique: the only victims are infants, the only defendants are women, and pregnancy is the only condition by which the disorder can be initiated); see also Barton, *supra* note 180, at 594 (noting that infanticide laws have pertained only to women).

## 2. Disparate Sentencing

Because each state has its own laws, discrepancies and inconsistencies in sentencing depend on the rule of precedent and nature of the state law.<sup>249</sup> In the absence of a federal law to act as a guideline, it is doubtful that a uniform policy encompassing society's humanitarian response to infanticides caused by postpartum psychosis will soon emerge.<sup>250</sup> Virtually relying upon the "luck of the draw," sentences for mothers who killed their children while suffering from postpartum psychosis vary from probation to between eight and twenty years imprisonment.<sup>251</sup> In addition to demonstrating disparity in sentencing, relevant case law also illustrates bias and the variety of emotions which infanticide may engender.<sup>252</sup>

In *State v. Kowalewsky*,<sup>253</sup> the defendant suffered from severe depression in conjunction with postpartum psychosis.<sup>254</sup> When her husband denied paternity of their newborn, the defendant killed the child by forcing it to ingest a household disinfectant.<sup>255</sup> Though the defendant was convicted by a jury, the appellate court noted that "any woman who could kill her only child must have suffered a mental derangement and should not be punished" but helped instead; thus the defendant was given a reduced sentence due to mitigating circumstances surrounding the child's death.<sup>256</sup>

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249. See SCHWARTZ & ISSER, *supra* note 63, at 77 (emphasizing that the same murder by the same mother could receive different treatment depending on the jurisdiction's laws, particular jury, or even the beliefs of a particular judge).

250. See *id.* at 85-86 (noting the usual sentence for a woman who commits infanticide as a result of postpartum psychosis contains no provisions for helping her to understand or cope with her conduct, much less to educate her to prevent repetitive behavior); Barton, *supra* note 180, at 619.

251. See EWING, *supra* note 51, at 66 (recognizing that sentencings of mothers who have committed infanticide while suffering from postpartum psychosis are dependent on a sympathetic judge or jury).

252. See *People v. Sims*, 750 N.E.2d 320, 322-25 (Ill. App. Ct. 2001). "Rather than nurture her two baby girls, she [defendant] killed them." *Id.* at 322. Even though the State "... endeavor[ed] to make Paula pay for her misdeeds in kind[,] [h]e [defense attorney] spoiled the State's effort to set a date with death." *Id.* The opinion noted "Paula [defendant] confessed her sins" and "her murderous bent was the by-product of postpartum psychosis." *Id.* at 324-25; see also *State v. Kowalewsky*, 24 Ohio Law Abs. 612, 615 (Ohio Ct. App. 1937). Prior to sentencing, the trial court in *State v. Kowalewsky* characterized the defendant as "a fiend and a monster" before the jury. *Kowalewsky*, 24 Ohio Law Abs. at 615.

253. 24 Ohio Law Abs. 612 (Ohio Ct. App. 1937).

254. See *Kowalewsky*, 24 Ohio Law Abs. at 614; Lentz, *supra* note 64, at 534 (stating that the nineteen-year-old mother was convicted of second-degree murder and consequently sentenced to life imprisonment for the death of her two-day-old son).

255. See *Kowalewsky*, 24 Ohio Law Abs. at 613-14; Lentz, *supra* note 64, at 534.

256. See *Kowalewsky*, 24 Ohio Law Abs. at 618-19; Lentz, *supra* note 64, at 535.

A similar defendant in *Commonwealth v. Comitz*,<sup>257</sup> however, was sentenced to eight to twenty years imprisonment upon conviction of third degree murder for the killing of her child.<sup>258</sup> The Superior Court of Pennsylvania affirmed the sentence, noting that a mental illness which supported a plea of "guilty but mentally ill" did not constitute a substantial ground excusing criminal conduct and warranting probation as a matter of law.<sup>259</sup> Because discretion in weighing mental illness as an excuse for criminal conduct during sentencing lies entirely within the province of the trial court, the Superior Court reiterated that the defendant posed a future threat to society as a result of her current mental illness, rather than her mental condition at the time of the murder.<sup>260</sup>

In *People v. Massip*,<sup>261</sup> the defendant, suffering from severe postpartum psychosis and distraught over the newborn's colic-induced crying, threw both the child and herself into oncoming traffic.<sup>262</sup> When her attempt proved unsuccessful, the defendant struck the child on the head with a blunt object and ran over the newborn twice with her car.<sup>263</sup> Despite a conviction by the jury, the trial court overturned the jury verdict and acquitted the defendant on grounds of temporary insanity.<sup>264</sup> Ordering the defendant to undergo at least one year of outpatient therapy to recover from postpartum psychosis, the trial judge reasoned that the re-

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257. 530 A.2d 473 (Penn. 1987).

258. See *Comitz*, 530 A.2d at 474; Lentz, *supra* note 64, at 535 (observing that the forensic psychiatrist termed the mother insane when she dropped her one-month-old son into a stream); Schroeder, *supra* note 110, at 286-87 (asserting that the defendant initially claimed her son had been kidnapped from her car at a local shopping center).

259. See *Comitz*, 530 A.2d at 477; Lentz, *supra* note 64, at 541 (recalling the trial court used the fact that postpartum psychosis was not listed in *DSM-III* as a reason for excluding medical testimony about postpartum psychosis as a mental illness); see also Schroeder, *supra* note 110, at 286-87 (arguing the mere fact that a coherent kidnapping story was concocted does not necessarily mean that a mother suffering from postpartum psychosis was thinking rationally). Although etiologies of postpartum disorders have not been fully discerned, it has been listed at least as a separate entity recognized by the medical profession in *DSM-IV*. See Lentz, *supra* note 64, at 541.

260. See *Comitz*, 530 A.2d at 477-78; Lentz, *supra* note 64, at 535; see also Schroeder, *supra* note 110, at 286-87 (asserting the trial court had accepted the defendant's guilty plea and found her to be mentally ill at the time of the offense).

261. 271 Cal. Rptr. 868 (Cal. Ct. App. 1990).

262. See *Massip*, 271 Cal. Rptr. at 868-69; Lentz, *supra* note 64, at 536; Schroeder, *supra* note 110, at 279; Debra Cassens Moss, *Postpartum Psychosis Defense: New Defensive Measure for Mothers Who Kill*, 74 A.B.A. J. 22, Aug. 1, 1988, available at LEXSEE 74 A.B.A. J. 22.

263. See *Massip*, 271 Cal. Rptr. at 869; Lentz, *supra* note 64, at 536; Schroeder, *supra* note 110, at 279; Moss, *supra* note 262; Debra Cassens Moss, *Postpartum: Psychosis Defense Succeeds* 75 A.B.A. J. 40, Feb. 1989, available at LEXSEE 75 A.B.A. J. 40.

264. See *Massip*, 271 Cal. Rptr. at 869; Lentz, *supra* note 64, at 536-37; Schroeder, *supra* note 110, at 280-81; Moss, *supra* note 263.

cord clearly indicated the defendant was obviously emotionally disturbed.<sup>265</sup> Upon further review, the appellate court concluded that the trial judge had exceeded the bounds of his authority but nevertheless affirmed the defendant's acquittal on a technicality.<sup>266</sup> Upon review,<sup>267</sup> the California Supreme Court instructed the Court of Appeals to vacate and reconsider its decision in light of *People v. Saille*.<sup>268</sup> On remand, the case was later voluntarily dismissed.<sup>269</sup>

In a return to a classic example illustrating the effects of postpartum psychosis discussed previously, Angela Thompson was charged with manslaughter and felony child abuse for the killing of her child.<sup>270</sup> Acquitted by reason of insanity, Thompson was ordered to spend ninety days at a psychiatric halfway house and to undergo years of outpatient psychiatric counseling.<sup>271</sup> When she gave birth to another child, Thompson was well-

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265. See *Massip*, 271 Cal. Rptr. at 869; Lentz, *supra* note 64, at 537; Schroeder, *supra* note 110, at 280-81; Moss, *supra* note 262 (noting that the defendant, previously described as a "passive, easy-going, mellow person" before her son was born, was diagnosed with postpartum psychosis and heard voices instructing her to kill the child because he was the devil); see also Moss, *supra* note 263.

266. See *Massip*, 271 Cal. Rptr. at 870; EWING, *supra* note 51, at 57-58 (stating the acquittal was affirmed because the prosecutors had waited an unreasonable length of time before bringing forth an appeal so that the delay would in effect disrupt the defendant's progress in rehabilitation and treatment); Lentz, *supra* note 64, at 536 (noting the trial judge only had power to order a new trial on the sanity issue); Schroeder, *supra* note 110, at 279-81 (discussing the *Massip* case and the judge's determination that went against the jury verdict); Moss, *supra* note 263 (contemplating the effect of allowing a judge to replace a jury verdict with his own opinion).

267. *People v. Massip*, 274 Cal. Rptr. 369 (Cal. 1990).

268. See *People v. Massip*, 4 Cal. Rptr. 2d 762 (Cal. 1992); *People v. Saille*, 2 Cal. Rptr. 2d 364, 369-373 (Cal. 1991) (holding that California law no longer permits reduction of what would be murder to voluntary manslaughter, as the trial court in the *Massip* case had done).

269. See Schroeder, *supra* note 110, at 281. Characterized as a "happy, healthy, nonviolent person who looked forward to motherhood," *Massip* took a class on infant care and diligently sought medical help for her son's frequent crying. *Id.* at 280-81. Almost immediately after Michael's birth, *Massip* began to experience feelings of confusion and worthlessness, suicidal ideations, hallucinations, and could neither sleep nor eat. *Id.* at 277-80. Hearing Michael's cries even in his absence and feeling walls and ceilings of rooms moving all around her, *Massip* visited her obstetrician thinking that she was having a nervous breakdown; her doctor merely prescribed her tranquilizers. *Id.* at 280. Describing "voices in her head telling her Michael was in pain and that she must put him out of his misery," *Massip* "felt as if she were in a tunnel and everything was moving slowly. . . [seeing her son] as a doll or an object, not a person." *Id.* Placing the infant's corpse in a trash can and later claiming that the child had been kidnapped, *Massip* confessed what she had done to her husband while they waited at the police station. *Id.*

270. See EWING, *supra* note 51, at 64; Schroeder, *supra* note 110, at 282-83.

271. See EWING, *supra* note 51, at 63-64; Lentz, *supra* note 64, at 538; Schroeder, *supra* note 110, at 282-83.

prepared to handle symptoms of postpartum psychosis, and both mother and child survived.<sup>272</sup>

## B. *Legal Recognition of Postpartum Psychosis*

### 1. A Gender-Specific Defense?

A postpartum psychosis defense can be seen as a notable exception to the principle of equality under the law.<sup>273</sup> Because underlying causes<sup>274</sup> of postpartum psychosis are unique only to women, use of the postpartum defense should also be sex-specific as mandated by the natural order of biology.<sup>275</sup> Some may contend that an exclusively female defense would encourage sexism and promote the notion that women should not be accorded full responsibility for their actions due to the inherent weaknesses of their sex.<sup>276</sup> However, to insist that a mother's actions committed while suffering from postpartum psychosis be judged equally to the actions of a man who is not inflicted by such mental illness is not only absurd, but also impossible.<sup>277</sup> There is no need to hide behind a shield of "special treatment" when the law focuses on a mental disturbance that prevents the defendant from forming the specific intent to kill, as op-

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272. See EWING, *supra* note 51, at 64-65 (commenting on how Thompson handled symptoms of postpartum depression with the constant monitoring of medical professionals and family and has since then created a statewide program to help law enforcement authorities identify and deal with mothers who suffer from postpartum depression); Brusca, *supra* note 110, at 1164 (observing that Thompson has since given birth to another son and sought to publicize the problem of postpartum psychosis); Lentz, *supra* note 64, at 537-38; Schroeder, *supra* note 110, at 282-83; Reece, *supra* note 110, at 750 (noting Thompson underwent hormonal treatments and supervision to prevent a recurrence of postpartum psychosis with the birth of her third child).

273. See Kumar & Marks, *supra* note 145, at 257.

274. Symptoms and causes of postpartum psychosis include hormonal changes, steroid metabolism, feelings of maternal inadequacy, and lack of social support in caring for the newborn.

275. See Lentz, *supra* note 64, at 543.

276. See SCHWARTZ & ISSER, *supra* note 63, at 3. Many see this defense as an anti-female argument under the belief that reproduction and lactation-produced emotional disturbance may legitimize the notion that women are inherently unstable because of their biology; this notion, of course, has implications for the integration of women into the world outside of the domestic sphere. See *id.* Feminists see infanticide laws as a way of giving women "special treatment" based on the notion that women are naturally susceptible to mental instability as a result of the biology of their sex (i.e., capability of giving birth). *Id.* at 37-38; see also Lentz, *supra* note 64, at 543-44; Edith J. Naselli-Carpenter, *No Death Penalty for Victim of Depression*, CHICAGO DAILY HERALD, Sept. 23, 2001, at 17, available at 2001 WL 28538281.

277. See SCHWARTZ & ISSER, *supra* note 63, at 113 (noting that infanticide itself is not a sex-specific offense, having been committed by both men and women alike throughout history and even today); Hans S. Nichols et al., *Feminists Scrap About Mother Who Killed Children*, INSIGHT MAG., Oct. 1, 2001, at 6, available at 2001 WL 29584682.

posed to the fact that such a defendant happens to be a woman.<sup>278</sup> Any disparity in the treatment of women who kill their children while suffering from postpartum psychosis lies in the recognition of a definitive link between the onslaught of childbirth and the subsequent development of a postpartum mental illness that may cause such individuals to kill while their "balance of mind is disturbed."<sup>279</sup>

As established in English common law for centuries, the concept of legal insanity acknowledges that an individual who does not know what he is doing, or that what he is doing is wrong, cannot be held criminally liable.<sup>280</sup> Thus, recognition of symptoms of postpartum psychosis and infanticide, as a distinct form of homicide, led Great Britain to formulate infanticide statutes in 1922 and 1938.<sup>281</sup> According to the British Infanticide Act of 1922, a mother who kills her infant during its first year of life cannot be convicted of murder but only manslaughter, upon the showing of a postpartum mental disorder. The defendant's diminished capacity at the time of the act reduces the charge from murder to manslaughter; thus the trial court has greater flexibility in the determination of sentencing, ranging from life imprisonment to psychiatric treatment.<sup>282</sup> Therefore, the mother generally receives a probationary sentence in combination with healthcare interventions instead of a prison sentence.<sup>283</sup>

The British Infanticide Acts have been replicated in slightly varying forms in at least twenty-two other countries, including Australia and Ca-

278. See Lentz, *supra* note 64, at 543-44.

279. See MEYER ET AL., *supra* note 74, at 11 (noting the British Infanticide Act of 1922 explicitly recognized that infanticide often occurs because "the balance of her [mother's] mind [is] disturbed by reason of her not having fully recovered from the effect of giving birth to the child"); Kumar & Marks, *supra* note 145, at 257 (emphasizing that a definite causal link between the process of reproduction and the occurrence of mental illness must first be established); O'Hara, *supra* note 96, at 10-20.

280. See *Finger v. State*, 27 P.3d 66, 80 (Nev. 2001).

281. See EWING, *supra* note 51, at 66; Lentz, *supra* note 64, at 537 (stating the British Infanticide Acts are also based on the concept of diminished responsibility to acquit or mitigate); MEYER ET AL., *supra* note 74, at 11; SCHWARTZ & ISSER, *supra* note 63, at 84; O'Hara, *supra* note 96, at 10-20.

282. See Lentz, *supra* note 64, at 537-39.

283. See EWING, *supra* note 51, at 66; MEYER ET AL., *supra* note 74, at 11; SCHWARTZ & ISSER, *supra* note 63, at 82 (recognizing involuntary manslaughter generally governs "unlawful killings that did not involve malice aforethought . . . where the defendant's conduct lacked a murderous intent, but involved a high degree of risk of death or serious bodily injury to the victim"). The British Infanticide Act of 1938 amends the 1922 act by allowing for environmental or other traumatic stresses, tending to specifically regard neonaticide and infanticide to lesser degrees as events which, due to psychological disorders, require treatment rather than punishment. SCHWARTZ & ISSER, *supra* note 63, at 84-85.

nada.<sup>284</sup> In Australia, a discretionary sentence for women who became "temporarily deranged" due to the after-effects of childbirth may offer a humane means of dealing with the problem of infanticide.<sup>285</sup> Likewise, Canada, as a derivative of British law, sees a homicidal mother suffering from postpartum psychosis as more of a threat to herself than to society.

In contrast, American law does not recognize infanticide as a separate category of crime, nor are there medical models for understanding infanticide or symptoms of postpartum psychosis.<sup>286</sup> Despite Congressional acknowledgment that postpartum psychosis is a common and serious problem, little seems to have been done to deal with this mental illness:

All too often postpartum depression goes undiagnosed or untreated due to social stigma surrounding depression and mental illness, the myth of motherhood, the new mother's inability to self-diagnose her condition, the new mother's shame or embarrassment over discussing her depression so near to the birth of her child, the lack of understanding in society and the medical community of the complexity of postpartum depression, and economic pressures placed on hospital providers. Untreated, postpartum depression impacts society through its affect on the infant's physical and psychological development, child abuse, neglect, or death of the infant or other siblings, and the disruption of the family.<sup>287</sup>

The only legal recognition which postpartum psychosis has successfully attained has been a meager acknowledgement of postpartum psychosis as a debilitating and serious medical condition when applied to concepts of damages, proximate cause, and negligence in civil case law.<sup>288</sup> There is still no American law which requires consideration of a mother's mental state when she committed neonaticide or infanticide while suffering from postpartum psychosis, aside from the ordinary concerns in homicide cases

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284. See MEYER ET AL., *supra* note 74, at 11; SCHWARTZ & ISSER, *supra* note 63, at 84; NEW SOUTH WALES LAW REFORM COMMISSION, REPORT NO. 82, PARTIAL DEFENSES TO MURDER DIMINISHED RESPONSIBILITY § 2.6 (1997).

285. See NEW SOUTH WALES LAW REFORM COMMISSION, *supra* note 284, §§ 3.22-24 (applying concepts of diminished responsibility where the mind is disturbed after childbirth); Lentz, *supra* note 64, at 539 (noting the English method of dealing with infanticidal mothers).

286. See MEYER ET AL., *supra* note 74, at 13; SCHWARTZ & ISSER, *supra* note 63, at 85; Lentz, *supra* note 64, at 530.

287. H.R. 2380, 107th Cong. (2001).

288. See, e.g., *Schuler v. Berger*, 395 F.2d 212, 213 (3d Cir. 1968); *Murray v. St. Mary's Hosp.*, 280 A.D. 803, 804 (N.Y. App. Div. 1952).

regarding the mother's ability to "appreciate" and "know" the wrongfulness of her conduct at the time of the act.<sup>289</sup>

## 2. The Texas Approach

Texas Penal Code section 6.01 requires proof that a person's death has occurred and that such death was the result of the criminal act or agency of another, otherwise known as *corpus delicti*.<sup>290</sup> A culpable mental state in conjunction with the commission of a voluntary act is also essential in order for the act to qualify as a "homicide."<sup>291</sup> According to section 19.03 of the Texas Penal Code, the act of killing a child under the age of six, otherwise known as infanticide, is considered a capital felony if requirements for murder are met under Texas Penal Code section 19.02.<sup>292</sup> Thus, mandatory punishment for a capital felony, and infanticide alike,

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289. See SCHWARTZ & ISSER, *supra* note 63, at 85; Goldstein, *supra* note 146, at 126-27; Lentz, *supra* note 64, at 530.

290. See TEX. PENAL CODE ANN. §§ 6.01, 6.02 (Vernon 2001); Catherine L. Goldenberg, *Sudden Infant Death Syndrome as a Mask for Murder: Investigating and Prosecuting Infanticide*, 28 Sw. U. L. REV. 599, 613-16 (1999); Jennifer L. Grossman, Note, *Postpartum Psychosis: A Defense to Criminal Responsibility or Just Another Gimmick?*, 67 U. DET. L. REV. 311, 317 (1990). Derived from its Latin origin as "body of the crime," *Corpus Delicti* is defined as the fact that a transgression has taken place or the physical evidence demonstrating that a crime has been committed. See BLACK'S LAW DICTIONARY 346 (7th ed. 1999).

291. See TEX. PENAL CODE ANN. §§ 6.01, 6.02 (Vernon 2001); REAMEY, *supra* note 206, at 213-17 (stating that homicides are classified as murder, capital murder, "heat of passion" killing, manslaughter, and criminally negligent homicide).

292. See TEX. PENAL CODE ANN. § 19.02 (Vernon 2001) (noting the following as requirements of murder: intentionally or knowingly causes death of another, intends serious bodily injury and acts clearly dangerous to human life results in death, or if death of someone occurs during commission of a felony other than manslaughter (felony murder)); TEX. PENAL CODE ANN. § 19.03 (Vernon 2001); REAMEY, *supra* note 206, at 214-15 (emphasizing the criminal intent requirement to commit or attempt to commit the offense and proof of specific intent to cause the death of an individual in the course of carrying out that intent even though proof of that specific intent does not necessarily mean that the defendant acted deliberately). Section 19.02, Murder, states:

(a) In this section:

- (1) "Adequate cause" means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection.
- (2) "Sudden passion" means passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation.

(b) A person commits an offense if he:

- (1) intentionally or knowingly causes the death of an individual;
- (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or



under Texas Penal Code section 12.31 warrants either life imprisonment or the death penalty, neither of which the State can waive.<sup>293</sup>

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- (3) commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.
  - (c) Except as provided by Subsection (d), an offense under this section is a felony of the first degree.
  - (d) At the punishment stage of a trial, the defendant may raise the issue as to whether he caused the death under the immediate influence of sudden passion arising from an adequate cause. If the defendant proves the issue in the affirmative by a preponderance of the evidence, the offense is a felony of the second degree.

TEX. PENAL CODE ANN. § 19.02 (Vernon 2001). Section 19.03, Capital Murder, observes:

- (a) A person commits an offense if he commits murder as defined under Section 19.02(b)(1) and:
  - (1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;
  - (2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, or obstruction or retaliation;
  - (3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;
  - (4) the person commits the murder while escaping or attempting to escape from a penal institution;
  - (5) the person, while incarcerated in a penal institution, murders another:
    - (A) who is employed in the operation of the penal institution; or
    - (B) with the intent to establish, maintain, or participate in a combination or in the profits of a combination;
  - (6) the person:
    - (A) while incarcerated for an offense under this section or Section 19.02, murders another; or
    - (B) while serving a sentence of life imprisonment or a term of 99 years for an offense under Section 20.04, 22.021, or 29.03, murders another;
  - (7) the person murders more than one person:
    - (A) during the same criminal transaction; or
    - (B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct; or
  - (8) the person murders an individual under six years of age.
- (b) An offense under this section is a capital felony.
- (c) If the jury or, when authorized by law, the judge does not find beyond a reasonable doubt that the defendant is guilty of an offense under this section, he may be convicted of murder or any other lesser included offense.

TEX. PENAL CODE ANN. § 19.03 (Vernon 2001).

293. See TEX. PENAL CODE ANN. § 12.31 (Vernon 2001); REAMEY, *supra* note 206, at 215. Section 12.31, Capital Felony, observes:

- (a) An individual adjudged guilty of a capital felony in a case in which the State seeks the death penalty shall be punished by imprisonment in the institutional division

In order to merit the death penalty, the jury must find beyond a reasonable doubt that (1) the defendant's conduct which caused the victim's death was deliberate with a reasonable expectation that death would result, (2) it is highly probable that a defendant would commit such criminal acts of violence again as to pose a continuing threat to society, and (3) the defendant's conduct was unreasonable, even if in response to provocation.<sup>294</sup> The acts of a mother committed while suffering from postpartum psychosis, however, do not appear to necessitate a punishment as severe as the death penalty nor imprisonment since she does not pose a continuous threat to society, herself, or any children she may have in the future if necessary treatment is received.<sup>295</sup> What purpose of punishment do we serve by punishing mothers for acts committed while suffering from postpartum psychosis? To achieve an illusion of justice, what will imprisonment or the death penalty accomplish aside from venting society's feelings of outrage and revenge?

## VI. PROPOSALS FOR CHANGE

*"With regard to the public, [infanticide] causes no alarm, because it is a crime which can be committed only by mothers upon their newly born children."*<sup>296</sup>

Sir James FitzJames Stephen, eighteenth-century jurist

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for life or by death. An individual adjudged guilty of a capital felony in a case in which the State does not seek the death penalty shall be punished by imprisonment in the institutional division for life.

- (b) In a capital felony trial in which the State seeks the death penalty, prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. In a capital felony trial in which the State does not seek the death penalty, prospective jurors shall be informed that the State is not seeking the death penalty and that a sentence of life imprisonment is mandatory on conviction of the capital felony.

TEX. PENAL CODE ANN. § 12.31 (Vernon 2001).

294. See TEX. PENAL CODE ANN. § 12.31 (Vernon 2001); TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 2001); REAMEY, *supra* note 206, at 215 (noting the jury cannot convict the defendant of murder or other lesser included offenses if it cannot find all of these elements).

295. This argument can be substantiated by the *Thompson* case. Prosecutors seeking the death penalty for Yates under the aforementioned sections of the Texas Penal Code must question if this is an appropriate punishment, as fitting within the goals of punishment under the criminal justice system. For more information on *Thompson*, see *supra* note 272 and corresponding text.

296. PEARSON, *supra* note 61, at 64.

### A. *Our Response: A New Direction*

Infanticide is not a rare and exceptional act committed by a deranged or evil woman. If society is to have any hope of preventing deaths of children at the hands of their mothers, we must change our tendency to blame only the mothers, identify the myriad ways in which our society tolerates and perpetuates infanticide, and work to change these biases. We can easily prevent infanticides by observing an underlying pattern evident in almost all infanticide cases, usually involving a combination of a mother's vulnerable mental health status and her lack of social support.<sup>297</sup> By recognizing the unique circumstances surrounding infanticide and instituting laws that prescribe a consistent treatment for those convicted and acquitted,<sup>298</sup> we must distinguish postpartum homicides from child abuse killings.

In the face of disparate sentences wholly dependent on the predilections of local prosecutors, judges, juries,<sup>299</sup> and the winds of politics, a statute must be created to treat infanticide cases and postpartum psychosis on the basis of an explicit justification and consider factors involving individual blameworthiness on a case-by-case basis. Under the Texas Mental Health Code's broad definition of "mental illness," conditions such as schizophrenia, bipolar disorder, and clinical depression are, like postpartum psychosis, neurobiological in nature and treatable as a biochemical disease.<sup>300</sup> As a mental illness, postpartum psychosis should, like schizophrenia and bipolar disorder, be recognized as a mitigating factor during charge and sentencing.<sup>301</sup>

Even a mother who has been acquitted by reason of insanity for acts committed while suffering from postpartum psychosis must be required to receive the necessary treatment. However, this has often proved to be difficult for the State, which must argue a position contrary to its contention at the trial court. Due to the debilitating effects and severity of the defendant's mental illness, the State will contend that the defendant is

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297. See Attia et al., *supra* note 85, at 110.

298. See EWING, *supra* note 51, at 66 (noting that convictions frequently depend on the sympathetic nature of the trier of fact and that evidence of actual psychosis must be established before a postpartum psychosis defense can be considered legally viable); MEYER ET AL., *supra* note 74, at 174 (discussing the development of legal responses to infanticide).

299. See MEYER ET AL., *supra* note 74, at 173-74 (noting the incoherent and arbitrary nature of case law within infanticide jurisprudence).

300. See Brian D. Shannon, *Diversion of Offenders with Mental Illness: Recent Legislative Reforms—Texas Style*, 20 MENTAL & PHYSICAL DISABILITY L. REP. 431, 432 (1996).

301. Schizophrenia and bipolar disorder are recognized as mitigating factors in a variety of case law. See *Commonwealth v. Rizzuto*, 777 A.2d 1069, 1088-89 (Pa. 2001) (holding that defendant's schizophrenia, though insufficient to overturn the jury's verdict, is a mitigating factor so as to warrant a new penalty hearing).

unable to control or modify her behavior so as to require civil commitment.<sup>302</sup> However, this argument contradicts the State's contention at

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302. *See id.* Section 574.034, Order for Temporary Mental Health Services denotes:

- (a) The judge may order a proposed patient to receive court-ordered temporary inpatient mental health services only if the judge or jury finds, from clear and convincing evidence, that:
  - (1) the proposed patient is mentally ill; and
  - (2) as a result of that mental illness the proposed patient:
    - (A) is likely to cause serious harm to himself;
    - (B) is likely to cause serious harm to others; or
    - (C) is:
      - (i) suffering severe and abnormal mental, emotional, or physical distress;
      - (ii) experiencing substantial mental or physical deterioration of the proposed patient's ability to function independently, which is exhibited by the proposed patient's inability, except for reasons of indigence, to provide for the proposed patient's basic needs, including food, clothing, health, or safety; and
      - (iii) unable to make a rational and informed decision as to whether or not to submit to treatment.
- (b) The judge may order a proposed patient to receive court-ordered temporary outpatient mental health services only if:
  - (1) the judge finds that appropriate mental health services are available to the patient; and
  - (2) the judge or jury finds, from clear and convincing evidence, that:
    - (A) the proposed patient is mentally ill;
    - (B) the nature of the mental illness is severe and persistent;
    - (C) as a result of the mental illness, the proposed patient will, if not treated, continue to:
      - (i) suffer severe and abnormal mental, emotional, or physical distress; and
      - (ii) experience deterioration of the ability to function independently to the extent that the proposed patient will be unable to live safely in the community without court-ordered outpatient mental health services; and
    - (D) the proposed patient has an inability to participate in outpatient treatment services effectively and voluntarily, demonstrated by:
      - (i) any of the proposed patient's actions occurring within the two-year period which immediately precedes the hearing; or
      - (ii) specific characteristics of the proposed patient's clinical condition that make impossible a rational and informed decision whether to submit to voluntary outpatient treatment.
- (c) If the judge or jury finds that the proposed patient meets the commitment criteria prescribed by Subsection (a), the judge or jury must specify which criterion listed in Subsection (a)(2) forms the basis for the decision.
- (d) To be clear and convincing under Subsection (a), the evidence must include expert testimony and, unless waived, evidence of a recent overt act or a continuing pattern of behavior that tends to confirm:
  - (1) the likelihood of serious harm to the proposed patient or others; or

the criminal trial that the defendant was able to form the requisite criminal intent in spite of her mental illness; thus a re-examination of the insanity defense may require a correlation between the Texas Penal Code and the Texas Mental Health Code.<sup>303</sup>

On May 26, 2001, the Texas legislature enacted S.B. No. 553, creating a task force to review the insanity defense and the methods and procedures by which a criminal defendant's competency to stand trial are evaluated.<sup>304</sup> This may indicate a potential change in the use of the insanity defense in Texas in 2003.

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- (2) the proposed patient's distress and the deterioration of the proposed patient's ability to function.
  - (e) To be clear and convincing under Subdivision (b)(2), the evidence must include expert testimony and, unless waived, evidence of a recent overt act or a continuing pattern of behavior that tends to confirm:
    - (1) the proposed patient's distress;
    - (2) the deterioration of ability to function independently to the extent that the proposed patient will be unable to live safely in the community; and
    - (3) the proposed patient's inability to participate in outpatient treatment services effectively and voluntarily.
  - (f) The proposed patient and the proposed patient's attorney, by a written document filed with the court, may waive the right to cross-examine witnesses, and, if that right is waived, the court may admit, as evidence, the certificates of medical examination for mental illness. The certificates admitted under this subsection constitute competent medical or psychiatric testimony, and the court may make its findings solely from the certificates. If the proposed patient and the proposed patient's attorney do not waive in writing the right to cross-examine witnesses, the court shall proceed to hear testimony. The testimony must include competent medical or psychiatric testimony. In addition, the court may consider the testimony of a nonphysician mental health profession as provided by Section 574.031(f).
  - (g) An order for temporary inpatient or outpatient mental health services shall state that treatment is authorized for not longer than 90 days. The order may not specify a shorter period.
  - (h) A judge may not issue an order for temporary inpatient or outpatient mental health services for a proposed patient who is charged with a criminal offense that involves an act, attempt, or threat of serious bodily injury to another person.
  - (i) A judge may advise, but may not compel, the proposed patient to:
    - (1) receive treatment with psychoactive medication as specified by the outpatient mental health services treatment plan;
    - (2) participate in counseling; and
    - (3) refrain from the use of alcohol or illicit drugs.

*Id.*

303. See *id.*; diGenova & Toensing, *supra* note 150, at 732.

304. See S.B. 553, 2001 Leg., 77th Sess. (Tex. 2001). The enrolled version of S.B. 553 states:

#### AN ACT

Relating to the creation of a task force to review the methods and procedures used to evaluate a criminal defendant's competency to stand trial and use of the insanity defense.

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BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:  
SECTION 1.

- (a) A task force is established to review the methods and procedures used to evaluate a criminal defendant's competency to stand trial and the use of the insanity defense and to submit a report to the 78th Legislature. The task force serves in an advisory capacity.
- (b) The task force is composed of 16 members as follows:
  - (1) a member of the senate appointed by the lieutenant governor;
  - (2) a member of the house of representatives appointed by the speaker of the house or representatives;
  - (3) a district judge appointed by the presiding judge of the court of criminal appeals;
  - (4) a representative of The University of Texas Medical Branch at Galveston and a representative of the Texas Tech University Health Sciences Center, each of whom has experience in forensic science, appointed by the executive head of the represented entity;
  - (5) a representative of a public or private school of law in this state with expertise in forensic or mental health law, appointed by the lieutenant governor; and
  - (6) the executive head of each of the following agencies or associations or that person's designated representative:
    - (A) the Texas Department of Criminal Justice;
    - (B) the Texas Department of Mental Health and Mental Retardation;
    - (C) the Texas Council on Offenders with Mental Impairments;
    - (D) the Texas District and County Attorneys Association;
    - (E) the Texas Criminal Defense Lawyers Association;
    - (F) the Texas Association of Counties;
    - (G) the Texas Medical Association;
    - (H) the Texas Society of Psychiatric Physicians;
    - (I) Capacity for Justice; and
    - (J) The Texas Psychological Association.
- (c) Initial appointments to the task force must be made not later than December 31, 2001.
- (d) The task force shall elect a presiding officer from its members at its first meeting. The task force shall meet at least four times each year and may meet at other times at the call of the presiding officer.
- (e) The Texas Council on Offenders with Mental Impairments shall perform the administrative functions of the task force.
- (f) The task force is not subject to Chapter 2110, Government Code. A member of the task force may not receive compensation but is entitled to reimbursement of the travel expenses incurred by the member while conducting task force business, as provided in the General Appropriations Act.
- (g) In conducting its review of the methods and procedures used to evaluate a criminal defendant's competency to stand trial and use of the insanity defense, the task force shall:
  - (1) examine the process by which the examination of a defendant is initiated and administered, including the required and actual use of forms and other documentation;
  - (2) review the manner in which a person is appointed to conduct an examination;
  - (3) evaluate the adequacy of the qualifications and training of persons who may be appointed to conduct an examination;

### B. *The "Guilty But Mentally Ill" Verdict*

Intended as a plea or additional verdict rather than a replacement for the insanity plea,<sup>305</sup> the "guilty but mentally ill" (GBMI) verdict was premised on the idea juries may decide that the defendant's mental illness, after weighing the evidence, was not serious enough to justify an acquittal but indicated a need for treatment.<sup>306</sup> As an alternative to the stark "all-or-nothing" scenario of either finding a mentally ill individual guilty of the criminal offense or completely acquitting them of any criminal liability,<sup>307</sup> the GBMI verdict presents different penalty implications for defendants whose mental health conditions do not rise to the level of legal insanity.<sup>308</sup>

Employed in cases invoking the insanity defense, the GBMI verdict requires the defendant to be guilty of an offense and to have been mentally ill, but not legally insane, when he committed the charged offense.<sup>309</sup> The court must determine whether the defendant is so severely mentally disabled as to be in need of treatment according to the provisions of the

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(4) consider alternative means to:

- (A) increase cost effectiveness in the examination process; and
- (B) maximize third-party payment of the cost of examinations; and
- (C) assess the potential use and benefits of telepsychiatry.

- (h) In addition to taking action under Subsection (g) of this section, the task force may take other action it considers necessary or advisable to conduct an effective review.
- (i) The task force shall submit a report based on its findings to the legislature not later than December 31, 2002. As part of its report, the task force shall submit to the legislature specific recommendations for legislation.
- (j) This Act expires and the task force established under this Act is abolished February 1, 2003.

#### SECTION 2.

This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2001.

*Id.*

305. See *Finger v. State*, 27 P.3d 66, 74 (Nev. 2001).

306. See Whatley, *supra* note 151, at 9; Ira Mickenberg, *A Pleasant Surprise: The Guilty but Mentally Ill Verdict Has Both Succeeded in Its Own Right and Successfully Preserved the Traditional Role of the Insanity Defense*, 55 U. CIN. L. REV. 943, 949-50 (1987).

307. See *Finger*, 27 P.3d at 74 (noting juries may be less inclined to improperly acquit defendants out of sympathy because they have a "middle-ground" option).

308. See *id.* (arguing that any sentence may be imposed on defendants who were convicted or pled to a guilty but mentally ill verdict, which can be lawfully imposed on any defendant convicted of the same offense); *Commonwealth v. Comitz*, 530 A.2d 473, 477 (Pa. Super. Ct. 1987); Mickenberg, *supra* note 306, at 988.

309. See SCHWARTZ & ISSER, *supra* note 63, at 109.

Mental Health Code at the time of sentencing.<sup>310</sup> Upon a verdict of "guilty but mentally ill," the defendant is placed on probation conditional upon receiving treatment.<sup>311</sup>

However, a finding of mental illness sufficient to support a guilty plea does not necessarily equate to a substantial ground which excuses the defendant's conduct.<sup>312</sup> In fact, the trial court can reject the sentence of probation to impose instead total confinement on defendants determined to be mentally ill; thus, a plea of "guilty but mentally ill" does not necessarily require a finding of probation in every case.<sup>313</sup> Upon evaluation during sentencing, a defendant found "guilty but mentally ill" may be institutionalized at a treatment facility or mental hospital instead of prison.<sup>314</sup> Nevertheless, the defendant must serve out the remainder of his sentence, even if he is released from the treatment facility before his prison term expires.<sup>315</sup> Conversely, if the prison sentence expires while the defendant is still in the treatment facility, the defendant must then be released or civilly committed.<sup>316</sup>

As of today, Texas has yet to adopt the GBMI verdict. Opponents contend the GBMI verdict may confuse jurors or allow them to evade their duties in cases involving insanity.<sup>317</sup> Arguably, the GBMI, as a supplement rather than replacement of the insanity defense,<sup>318</sup> aids rather than confuses jurors by giving them a more flexible range of verdicts by which to conform the weight of the evidence to their decision.<sup>319</sup> If the GBMI verdict was used to provide psychiatric care to those found guilty but nevertheless mentally ill, opponents argue Texas law already accomplishes this result by providing for the transfer of any prisoner in the custody of

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310. See *Comitz*, 530 A.2d at 477.

311. See *id.*

312. See *id.*

313. See *id.*

314. See *Whatley*, *supra* note 151, at 9.

315. See *id.* (determining a penal sentence would be imposed on the defendant if he was found guilty, but such defendants usually receive psychiatric care instead); *Barton*, *supra* note 180, at 600; *Mickenberg*, *supra* note 306, at 988.

316. See *Whatley*, *supra* note 151, at 9.

317. See *id.* at 10 (noting that, because the line between insanity and sanity is already imprecise, forcing laymen to distinguish also between insanity and some lesser degree of mental illness just compounds the problem); *Farabee & Spearly*, *supra* note 203, at 676 (arguing the guilty but mentally ill verdict unnecessarily complicates the trial process and may mislead the public into believing that this verdict replaced the insanity defense).

318. See *Mickenberg*, *supra* note 306, at 992.

319. See *Whatley*, *supra* note 151, at 10 (clarifying the guilty but mentally ill verdict allows jurors to indicate a need for mental health care without compromising their judgment of the defendant's moral blameworthiness); Christopher Slobogin, *The Guilty but Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494, 495 (1985).



the Department of Corrections to a mental hospital if treatment is required.<sup>320</sup> But article 46.01, section 2, the provision by which the State is authorized to transfer prisoners in this manner under the Texas Code of Criminal Procedure, has been repealed by acts of the seventy-sixth legislature in 1999. As a legal conviction,<sup>321</sup> a GBMI verdict allows the defendant to receive psychiatric care during his prison sentence if the jury finds that the defendant suffers from a mental illness.<sup>322</sup> The State must still prove all elements of the charged offense, including *mens rea*, while the defendant bears the burden of proving the existence of a mental illness.<sup>323</sup>

The purposes of the GBMI verdict calibrate closely with the treatment and rehabilitation goals of postpartum psychosis. The defendant is sentenced as if he had been found guilty but afforded medical and psychiatric treatment while being confined in either a mental hospital or prison for the entirety of his sentence.<sup>324</sup> Because the medical definition of insanity does not necessarily correspond to its legal counterpart, postpartum psychosis may not meet the requirements of legal insanity. Acts of infanticide, even when committed while suffering from postpartum depression, are punishable crimes which also warrant medical or psychiatric treatment. Use of the GBMI verdict creates a uniformity of outcomes and allows juries to make an unambiguous statement about the defendant's guilt, mental condition, and moral responsibility, eliminating conflicts between legal and medical experts in the Battle of Experts.<sup>325</sup>

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320. See TEX. CODE CRIM. PROC. ANN. art. 46.01(2) (Vernon 2001) (indicating that prisoners are returned to the Texas Department of Corrections to serve the remainder of their sentences upon completion of their treatment). Effective since September 1, 1999, this section has been repealed by the seventy-sixth legislative session. *Id.*

321. See Mickenberg, *supra* note 306, at 988 (reasoning that a finding of GBMI may only be made after the jury decides to reject the insanity defense under the rationale that, since the defendant was sufficiently in possession of his faculties to be morally blameworthy for his act even though he was mentally ill, his act constitutes a criminal conviction that is equivalent to a verdict of guilty).

322. See diGenova & Toensing, *supra* note 150, at 729-33 (noting that defendants under this verdict are criminal defendants who have a degree of mental illness and should be released only after they have both substantially served the sentence imposed for the crime committed and are determined to be no longer dangerous, rather than being released either when their sentence is completed or they are no longer mentally ill); Mickenberg, *supra* note 306, at 950.

323. See diGenova & Toensing, *supra* note 150, at 732-33.

324. See Mickenberg, *supra* note 306, at 950-88.

325. See TEX. R. EVID. 702, 703 (noting that the Battle of the Experts is defined in the commentary as occurring when both sides attempt to produce expert testimony for their argument); Mickenberg, *supra* note 306, at 989. Rule 702, Opinions and Expert Testimony, states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an

Unlike the justification defense, the GBMI verdict provides necessary and acceptable mitigation in the form of psychiatric assistance while the defendant serves his sentence, as opposed to reducing the degree of crime for which the defendant is responsible.<sup>326</sup> Noting defendants convicted under the GBMI verdict have been given the same treatment while serving their prison sentences as those found guilty and diagnosed with mental illness,<sup>327</sup> opponents allege that GBMI is a useless verdict that gives the mistaken impression to jurors that they are helping the mentally ill by providing psychiatric care.<sup>328</sup> While defendants convicted of the GBMI verdict *should* theoretically receive medical treatment as part of the intended purposes of GBMI, in practice, this goal has not been realized.<sup>329</sup> This inconsistency exists for purely financial reasons, however.<sup>330</sup> The lack of state funding for treatment is the culprit rather than a flaw in the GBMI verdict itself.<sup>331</sup>

### C. Mitigation

Texas Penal Code section 8.05 states that a mitigating factor of duress may apply to situations in which some type of external pressure is directly exerted upon the defendant in an attempt to force commission of the crime.<sup>332</sup> Unlike defenses employing duress, coercion, threat, and compulsion, some may argue postpartum psychosis deals with internal, psy-

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opinion or otherwise." TEX. R. EVID. 702. Rule 703, Opinions and Expert Testimony, observes:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

TEX. R. EVID. 703.

326. See Mickenberg, *supra* note 306, at 990.

327. See Whatley, *supra* note 151, at 10.

328. See Mickenberg, *supra* note 306, at 993.

329. See *id.*

330. See *id.* at 993-95.

331. See *id.* (stressing the fact that just because there is no funding does not mean that a good idea should be abandoned, rather the question of funding must be resolved to make the idea work).

332. See TEX. PENAL CODE ANN. § 8.05 (Vernon 2001) (noting the affirmative defense is available where defendants are compelled by an imminent threat of serious bodily injury or death to themselves or another); *State v. Holden*, 365 S.E.2d 626, 629 (N.C. 1988) (relating North Carolina's statutory mitigating factor of duress). Section 8.05, Duress, denotes:

- (a) It is an affirmative defense to prosecution that the actor engaged in the proscribed conduct because he was compelled to do so by threat of imminent death or serious bodily injury to himself or another.

chological forces which lead a mother to take the life of her child. Arguably, even though the defendant's psychological conditions were caused by external factors (i.e., stressful environment or lack of social support), such external factors were not directed toward forcing the defendant to commit the crime; thus, evidence of the defendant's mental condition demonstrates the defendant performed the act under influence of mental suffering rather than compulsion.<sup>333</sup> However, this does not account for the fact that external factors which cause the defendant's psychological condition may have been *one* of the various biological and internal elements which exerted direct control over the defendant in the form of postpartum psychosis, allowing partial mitigation to still be a viable alternative.

Undoubtedly, neonaticide and infanticide, even in their most basic definitions, are crimes that should be punished as such, but defendants who act while suffering from postpartum psychosis can also be seen as victims; their actions are almost understandable as inevitable responses to a hostile psychological environment.<sup>334</sup> Such individuals become a potential threat to society when no treatment or rehabilitation is made available to prevent them from repeating their behavior in the future.

In seeking the most effective method by which the goals of punishment can be achieved, we are faced with several options. Following the trend spearheaded by Great Britain, we can alternatively choose to charge a defendant who acted while suffering from postpartum psychosis with manslaughter as opposed to murder. Moreover, we can combine a sentence of imprisonment with mandatory psychiatric care.<sup>335</sup> Since incarceration alone cannot help a defendant suffering from postpartum psychosis modify her behavior or educate her so as to avoid future repetitious behavior, the defendant can also be hospitalized in a psychiatric in-

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- (b) In a prosecution for an offense that does not constitute a felony, it is an affirmative defense to prosecution that the actor engaged in the proscribed conduct because he was compelled to do so by force or threat of force.
  - (c) Compulsion within the meaning of this section exists only if the force or threat of force would render a person of reasonable firmness incapable of resisting the pressure.
  - (d) The defense provided by this section is unavailable if the actor intentionally, knowingly, or recklessly placed himself in a situation in which it was probable that he would be subjected to compulsion.
  - (e) It is no defense that a person acted at the command or persuasion of his spouse, unless he acted under compulsion that would establish a defense under this section.

TEX. PENAL CODE ANN. § 8.05 (Vernon 2001).

333. See *Holden*, 365 S.E.2d at 629-30.

334. See SCHWARTZ & ISSER, *supra* note 63, at 81.

335. See *id.* at 83.

stitution or ordered to serve probation coupled with psychotherapy.<sup>336</sup> However, such proposals may contradict the moral blamelessness argument provided by the insanity defense, where the defendant lacked the essential element of criminal intent.<sup>337</sup>

#### D. Education

A bill proposed in the House of Representatives instituting the Melanie Stokes<sup>338</sup> Postpartum Depression Research and Care Act<sup>339</sup> is representative of federal recognition of the problems caused by postpartum psychosis. The Act aims to provide research and services for women suffering from postpartum depression by expanding our current understanding of postpartum conditions. In addition to providing funding for research to develop and improve diagnostic techniques and treatments for postpartum disorders,<sup>340</sup> the Act also creates informative programs to educate healthcare professionals and the public alike about symptoms of postpartum psychosis so as to avoid tragedies which are easily preventable.<sup>341</sup> Moreover, a trend toward therapeutic jurisprudence distinguishes infanticide from more "traditional" homicides and emphasizes the need for different prosecutorial and punitive measures.<sup>342</sup> Encouraging judges to learn how other countries deal with neonaticide and infanticide, therapeutic jurisprudence questions the logic of incarcerating a defendant who acted under a mental illness or cognitive dysfunction, focusing instead on rehabilitation.<sup>343</sup>

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336. See *id.* at 86 (stressing probation can possibly be served with a condition of community service to educate others).

337. See Lentz, *supra* note 64, at 543.

338. See 147 CONG. REC. E1278 (daily ed. June 29, 2001) (statement of Rep. Rush) (noting the Melanie Stokes Postpartum Depression Research and Care Act was introduced not only in memory of Melanie Stokes but also all women who suffered from postpartum depression and psychosis). Melanie Stokes suffered from postpartum psychosis after giving birth to her daughter and consequently jumped from a twelve-story window to her death on June 11, 2001. *Id.* This Act recognizes that more than 400,000 women suffer from postpartum mood changes each year and approximately 80% of new mothers experience "baby blues." *Id.*

339. See H.R. 2380, 107th Cong. (2001).

340. See *id.*

341. See *id.*

342. See SCHWARTZ & ISSER, *supra* note 63, at 154-55.

343. See *id.* (providing the act of incarcerating mothers will not deter another from committing infanticide under the rationale that, if one does not plan for an act to occur, one cannot be deterred from such act, advocating instead incarceration in combination with mandatory rehabilitative counseling or psychotherapy as a condition of probation, parole, or ultimate release).

## VII. CONCLUSION

*"What a society perceives about violence has less to do with a fixed reality than the lenses we are given through which to see."*<sup>344</sup>

Patricia Pearson, twentieth-century writer

The widespread belief that "people are getting away with murder" and the public outcry engendered by infanticide are producing an ugly anger that inevitably undermines our compassion and erodes our understanding of postpartum psychosis as a mental illness. Though our need to exact retribution may be satisfied temporarily by punishing the mothers who act while inflicted by postpartum psychosis, the morality and humanity of society will suffer in the long run. Even though postpartum psychosis has long been established as a mental illness medically recognized to cause violent crimes, we have been hesitant to give it the same legal response that we use for other mental conditions such as schizophrenia. This reluctance has been in part because postpartum psychosis affects only one particular group of our society and forces us to examine our own prejudices and biases formed about the social construct of motherhood.

Our punitive approach toward postpartum psychosis is ineffective and fails to fulfill any of the goals of punishment within the criminal justice system. Realizing that "understanding" is not the equivalent of "excusing," we must strive instead to understand and treat postpartum psychosis-induced conduct so as to prevent a reoccurrence of such behavior. It is undisputed that a mother who kills her child while suffering from postpartum psychosis has committed a crime, but the uneven treatment and emphasis on punishment across the United States of mothers who commit infanticide must be restructured, and the way that they "pay" for their acts re-evaluated. Do we want to exact retribution from those who did not know what they were doing was wrong? What will our public need for retribution accomplish? Furthermore, can the mentally ill be deterred by punishment and incarceration alone, without attempts at rehabilitation and treatment for their mental illness?

Aristotle once noted, "[W]hat lies in our powers to do, lies in our powers not to do."<sup>345</sup> As Harris County prosecutors seek the death penalty in the case of Andrea Yates in January 2002,<sup>346</sup> we can no longer ignore the consequences of postpartum psychosis—otherwise the tragedy has only just begun.

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344. PEARSON, *supra* note 61, at 6.

345. diGenova & Toensing, *supra* note 150, at 728.

346. See Bruce Nichols, *Yates Trial Faces Long Jury Selection*, DALLAS MORNING NEWS, Jan. 6, 2002, at 45A; David Williams, *Postpartum Psychosis: A Difficult Defense*, Feb. 27, 2002, at <http://www.cnn.com/2001/LAW/06/28/postpartum.defense/index.html>.

## VIII. EPILOGUE

*"It seems to me we are still back in the days of the Salem witch trials."*<sup>347</sup>

George Parnham, defense attorney for Yates

Andrea Yates pleaded not guilty by reason of insanity and was convicted of two counts of capital murder in the drownings of Noah, aged 7, John, aged 5, and six-month-old daughter Mary on March 12, 2002.<sup>348</sup> After three and a half hours of deliberation, the 8-women and 4-men jury panel rejected the defense's argument that Yates was so mentally ill when she drowned the children she was unaware her conduct was wrong.<sup>349</sup> Although Harris County District Attorney Chuck Rosenthal had previously announced the State would seek execution, prosecutors failed to directly ask the jury to recommend the death penalty and offered no witnesses or evidence during the sentencing phase.<sup>350</sup> In fact, prosecutors

347. *Quotes of the Week*, OMAHA WORLD-HERALD, Mar. 15, 2002, at 7E, available at 2002 WL 5329769.

348. See Carol Christian, *Jury Gives Yates Life Term with No Parole for 40 Years*, HOUSTON CHRON., Mar. 16, 2002, at 1, available at 2002 WL 3249582; Carol Christian, *Rosenthal Weighs More Charges in Yates Case*, HOUSTON CHRON., Mar. 26, 2002, at NEWS15, available at 2002 WL 3251910; Pam Easton, *Family Pleads for Yates' Life at Sentencing*, MILWAUKEE J. SENTINEL, Mar. 15, 2002, at 3A, available at 2002 WL 3129814; Pam Easton, *Yates Avoids Facing the Executioner; She'll Do 40 Years Before Possibility of Parole*, SAN ANTONIO EXPRESS-NEWS, Mar. 16, 2002, at 01A, available at 2002 WL 13907547; Pam Easton, *Yates Is Formally Sentenced to Life*, FORT WORTH STAR-TELEGRAM, Mar. 19, 2002, available at 2002 WL 15685400; *Insanity Laws Must Change, Child Killer's Lawyer Says*, DESERET NEWS (Salt Lake City, Utah), Mar. 29, 2002, at A06, available at 2002 WL 16589765; Terri Langford & Anne Marie Kilday, *For Yates, Life Behind Bars: Jury Takes 35 Minutes to Decide that Mother Doesn't Deserve Death*, DALLAS MORNING NEWS, Mar. 16, 2002, at 1A, available at 2002 WL 15815913; Megan K. Stack, *Yates Gets Life Term for Killing Her Children; Prosecution Didn't Ask for Execution*, SEATTLE TIMES, Mar. 16, 2002, at 2A, available at 2002 WL 3893728.

349. See Christian, *Jury Gives Yates Life Term with No Parole for 40 Years*, *supra* note 348; Easton, *Family Pleads for Yates' Life at Sentencing*, *supra* note 348; Easton, *Yates Avoids Facing the Executioner; She'll Do 40 Years Before Possibility of Parole*, *supra* note 348; *Insanity Laws Must Change, Child Killer's Lawyer Says*, *supra* note 348; Langford & Kilday, *supra* note 348.

350. See Christian, *Jury Gives Yates Life Term with No Parole for 40 Years*, *supra* note 348 (observing that prosecutors clearly decided not to push aggressively for the death penalty and claimed that they would accept whichever sentence the jurors chose); Easton, *Family Pleads for Yates' Life at Sentencing*, *supra* note 348; Easton, *Yates Avoids Facing the Executioner; She'll Do 40 Years Before Possibility of Parole*, *supra* note 348 (stating that prosecutors denied making a less-than-passionate appeal for the death penalty in closing arguments); Langford & Kilday, *supra* note 348 (stating prosecutors appeared to concede that anything less than a death penalty decision was acceptable); Stack, *supra* note 348 (recognizing Assistant District Attorney Joseph Owmbly later commented, "I didn't think the facts in this case warranted asking the jury for the death penalty"). In closing argu-

openly acknowledged during trial that Yates suffered from a severe mental illness.<sup>351</sup>

Because they felt Yates did not pose a future danger to society, the same jury panel took only thirty-five minutes to return an automatic life sentence, thereby sparing her life on March 15, 2002.<sup>352</sup> Rosenthal has since declared that charges will not be filed against Yates in the deaths of her sons Paul, aged 3, and Luke, aged 2.<sup>353</sup> Defense attorneys for Yates intend to allege on appeal that prosecutors, by invoking the death penalty, skewed the jury pool in favor of the State through pre-selection of jurors less likely to accept an insanity defense.<sup>354</sup> Because the prosecution never proved Yates posed any future danger, a requisite element in seeking the death penalty, the defense argues that the prosecution sought the death penalty solely to screen out sympathetic jurors.<sup>355</sup> Moreover,

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ments, Prosecutor Owmbly told jurors if they "want[ed] to sentence her [Yates] to life rather than a death sentence, they will have done the right thing." Stack, *supra* note 348.

351. See Easton, *Family Pleads for Yates' Life at Sentencing*, *supra* note 348; Langford & Kilday, *supra* note 348. Noting Yates suffered from psychosis since 1999, psychiatric witnesses for both the defense and prosecution agreed Yates was mentally ill, and, as a result of her delusional thinking, she may have believed killing her children was the right thing to do. See Langford & Kilday, *supra* note 348.

352. See Christian, *Jury Gives Yates Life Term with No Parole for 40 Years*, *supra* note 348; Christian, *Rosenthal Weighs More Charges in Yates Case*, *supra* note 348; Easton, *Yates Avoids Facing the Executioner; She'll Do 40 Years Before Possibility of Parole*, *supra* note 348; Easton, *Yates Is Formally Sentenced to Life*, *supra* note 348 (noting Yates, as the seventieth woman in Texas imprisoned for killing one or more of her children, is serving two concurrent life terms and will be eligible for parole in 2041); *Insanity Laws Must Change, Child Killer's Lawyer Says*, *supra* note 348; Langford & Kilday, *supra* note 348 (stating Yates must serve 40 years of her sentence before she can become eligible for parole); Stack, *supra* note 348 (observing Yates will be 77 years old before she is eligible for parole).

353. See Langford & Kilday, *supra* note 348 (indicating the prosecution felt that evidence issues appeared to improve their chances of a conviction if the children's deaths were split up); Stack, *supra* note 348.

354. See Alan Dershowitz, *Yates Prosecutors Manipulated Jury Choice*, *NEWSDAY*, Mar. 20, 2002, at A35, available at 2002 WL 2734172 (contending the Harris County District Attorney's Office practically asked jurors not to return a death sentence as a widespread tactic to manipulate the criminal justice system). If Yates had received the death penalty, the merits of her entire case, including her conviction, would be viewed under stricter scrutiny by appellate courts, aside from inviting more controversy and criticism. See *id.* Prosecutors can challenge for cause any juror who would be unwilling to impose the death sentence and thus ensure that they have a skewed jury consisting almost exclusively of people who favor the death penalty and who tend to be more pro-prosecution. See *id.*; see also T.J. Milling, *Attorneys Make Case for Appeal by Yates*, *HOUSTON CHRON.*, Mar. 29, 2002, at NEWS33, available at 2002 WL 3252767.

355. See Dershowitz, *supra* note 354; Milling, *supra* note 354. The prosecution counters by noting Yates' crime was heinous enough to serve as proof of the future threat she posed to society. See Milling, *supra* note 354.

the defense contends that Yates believed she was doing the right thing despite her knowledge that her act was illegal.<sup>356</sup>

Like the many occasions when she alone had to care for her brood of small children while confronting her own emotional and mental instability, Yates was alone once again at her formal sentencing on March 18, 2002; her husband and relatives were making television appearances.<sup>357</sup> Attributing responsibility to doctors for misdiagnosing his wife's illness and taking her off her medication, Russell Yates blamed Texas law for defining insanity too narrowly and the public for not understanding mental illness.<sup>358</sup> Yet how much of his family's current circumstances can be attributed to him?<sup>359</sup> Why did Russell Yates not insist that they stop having more children when confronted with the doctor's warnings and his wife's obviously fragile mental and emotional state, as evidenced by her previous bouts with mental illness and suicide attempts?<sup>360</sup> Despite his recognition of these factors, why did he not work to alleviate some of the pressure on Andrea Yates?<sup>361</sup>

While Yates' brother and mother accused Russell Yates of being a neglectful husband oblivious to the signs that Yates could no longer handle the overwhelming stress of her everyday life, how fervently did they challenge Russell Yates on Andrea's behalf?<sup>362</sup> How much assistance did they offer despite their claims that they tried to intervene?<sup>363</sup> Not only did the inflexible insanity standard under Texas law fail to address her

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356. See Dershowitz, *supra* note 354; Milling, *supra* note 354 (criticizing also Dietz's use of evidence from a prior competency hearing in the trial as a violation of state law). The defense specifically attacks the false testimony of the prosecution's expert psychiatric witness, Dr. Park Dietz; Dietz testified Yates may have gotten the idea for her crime from a television show about a woman who drowned her children and was acquitted by reason of insanity, even though it was later discovered that this show never existed. See Milling, *supra* note 354.

357. See Easton, *Yates Is Formally Sentenced to Life*, *supra* note 348 (noting Yates' brother was on ABC's Good Morning America and her husband Russell Yates was featured on NBC's Today Show); Sheryl McCarthy, *Yates Husband Had a Hand in this Tragedy*, RECORD (Bergen County, N.J.), Mar. 22, 2002, at L11, available at 2002 WL 4651019.

358. See Easton, *Yates Is Formally Sentenced to Life*, *supra* note 348; Sally Kalson, *His Children's Graves Tell a Different Story*, PITTSBURGH POST-GAZETTE, Mar. 27, 2002, at B1, available at 2002 WL 3805413; McCarthy, *supra* note 357.

359. See Easton, *Yates Is Formally Sentenced to Life*, *supra* note 348; Kalson, *supra* note 358; McCarthy, *supra* note 357.

360. See Easton, *Yates Is Formally Sentenced to Life*, *supra* note 348; Kalson, *supra* note 358; McCarthy, *supra* note 357.

361. See Easton, *Yates Is Formally Sentenced to Life*, *supra* note 348; Kalson, *supra* note 358; McCarthy, *supra* note 357.

362. See Easton, *Yates Is Formally Sentenced to Life*, *supra* note 348; Kalson, *supra* note 358; McCarthy, *supra* note 357.

363. See Easton, *Yates Is Formally Sentenced to Life*, *supra* note 348; Kalson, *supra* note 358; McCarthy, *supra* note 357.



case, Andrea Yates' conviction was most notably tragic in the sense that the people closest to Yates watched her slowly deteriorate both emotionally and mentally, heading into an eventual collapse, and still did nothing to stop such an easily preventable tragedy.<sup>364</sup>

In addition to raising public awareness of postpartum psychosis and postpartum mood disorders, the *Yates* case serves as a vehicle to examine some of the oldest and most controversial topics in legal discourse.<sup>365</sup> Analyzing issues from whether to hold mentally ill people responsible for criminal acts<sup>366</sup> to exposing the unethical, and perhaps unconstitutional, prosecutorial practice of invoking the death penalty to skew the jury in its favor,<sup>367</sup> this case also elicits national discussion and criticism of topics such as medical insurance coverage and prevailing gender roles today.<sup>368</sup>

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364. See Easton, *Yates Is Formally Sentenced to Life*, *supra* note 348; Kalson, *supra* note 358; McCarthy, *supra* note 357. Rosenthal recently stated that he had assigned a member of his staff to look into the possibility of more charges, such as child endangerment or negligent homicide, in the *Yates* case. See Christian, *Rosenthal Weighs More Charges in Yates Case*, *supra* note 348. Noting that Texas law permits prosecution for crimes of commission as well as omission, Rosenthal contends that anyone guilty of contributing to the children's deaths will be prosecuted. See *id.* In response, Russell Yates' attorney emphasized that his client is the epitome of a "victim" as defined by the penal code and does not believe him to have committed any wrongdoing. See *id.* The *Yates* case and other examples of mothers who have committed infanticide while suffering from postpartum psychosis are all interlinked by a general pattern of recognizable symptoms, which would have been relatively easy to diagnose and treat had those around them intervened.

365. See *Insanity Laws Must Change, Child Killer's Lawyer Says*, *supra* note 348; Mike Tolson & Todd Ackerman, *Jury Gives Yates Life Term with No Parole for 40 Years / A Catalyst for Change in Law on Insanity?*, *HOUSTON CHRON.*, Mar. 16, 2002, at NEWS1, available at 2002 WL 3249596.

366. See Tolson & Ackerman, *supra* note 365 (noting Texas Representative Garnet Coleman intends to introduce a bill in the upcoming legislative session to refine the insanity defense statute). Since the national movement to eliminate the insanity defense, following John Hinckley, Jr.'s acquittal of the attempted assassination of President Ronald Reagan in 1981, the modern insanity statute differs little from those that existed before the advent of psychiatry and neuroscience. See *Insanity Laws Must Change, Child Killer's Lawyer Says*, *supra* note 348; Milling, *supra* note 354; Tolson & Ackerman, *supra* note 365. National debate spurred by the *Yates*' trial gave rise to Pennsylvania's Senate Bill 26, which seeks to exempt inmates with specific signs of chronic mental illness from the death penalty under similar statutes pertaining to the mentally retarded. See *Our View: Death Row and the Mentally Ill*, *CENTRE DAILY TIMES* (State College, Pa.), Mar. 21, 2002, at 8A, available at 2002 WL 4547753; Tolson & Ackerman, *supra* note 365.

367. See Dershowitz, *supra* note 354 (observing courts generally refuse to look behind the prosecutors' claim that they are seeking the death penalty in good faith); Milling, *supra* note 354. This unfair practice serves to distort the fact-finding function of the jury. See Dershowitz, *supra* note 354.

368. See Christian, *Jury Gives Yates Life Term with No Parole for 40 Years*, *supra* note 348; *Insanity Laws Must Change, Child Killer's Lawyer Says*, *supra* note 348 (noting a legislative change must be brought about because "the way the law has been applied has

The *Yates* case is a catalyst which demands more than a mere re-examination of the insanity standard under Texas law; it requires an evaluation of influences within our society as a whole.

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nothing to do with the science and what we know about mental illness"); Langford & Kilday, *supra* note 348; McCarthy, *supra* note 357.